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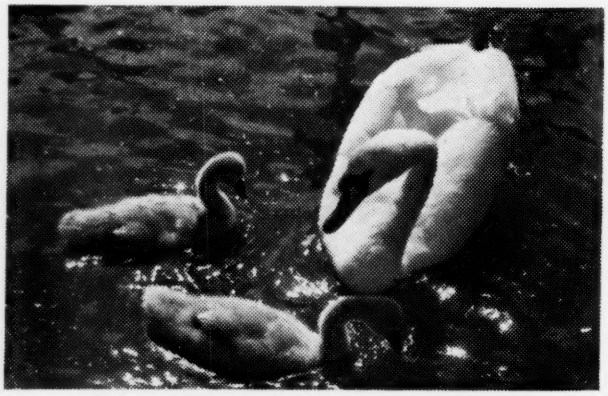

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THE

SOLICITORS' JOURNAL

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CURRENT TOPICS

The Budget

IN common with their fellow citizens solicitors will undoubtedly welcome the CHANCELLOR'S main proposals to reduce the standard rate of income tax by 9d. to 7s. 9d. in the pound and each of the reduced rates by 6d., to cut most rates of purchase tax by one-sixth, to extend repayment of post-war credits and to restore investment allowances. Beer duty is reduced and liquor licence duties are to be reformed. Altogether tax cuts amounting to £360 million in a full year are to be made. Tax avoidance measures are to include further amendments of this country's Double Taxation Agreement with Eire of 1926 (as amended), to stop the operation of dividend stripping at the Revenue's expense through companies set up and resident in the Irish Republic; and to eliminate the form of "bond washing" by which certain dealers make tax-free profits by purchasing securities cum-dividend and selling them ex-dividend. The effect of *Re Hodge's Policy* [1958] Ch. 239 (C.A.), is to be nullified by amendment of the law so that for estate duty purposes gifted life assurance policies and policies providing annuities will be treated similarly to other gifts *inter vivos*. The Corporation Tax introduced in 1885 and now only yielding some £150,000 annually is to be abolished. *Ad valorem* stamp duties on sea insurance policies are to be replaced by a fixed duty of 6d. as on other kinds of accident policies, at a cost of £3 million in a full year. The Revenue will lose the same amount by the raising of the limits of deduction for purposes of profits tax in respect of the remuneration of directors of director-controlled companies.

Judicial Changes

THE retirement of LORD MORTON OF HENRYTON as a Lord of Appeal in Ordinary has been followed by various transfers amongst and appointments to the Judiciary. LORD JUSTICE JENKINS succeeds Lord Morton as a Law Lord and his place in the Court of Appeal is filled by Mr. JUSTICE HARMAN. Mr. JUSTICE ARTHIAN DAVIES is being transferred from the Probate, Divorce and Admiralty Division to the Queen's Bench Division. The former Division is being strengthened by the assignment thereto of two of the three new judges, namely, Mr. ARCHIE PELLOW MARSHALL, Q.C., and Mr. HENRY JOSCELINE PHILLIMORE, Q.C. The third new judge, Mr. CHARLES RODGER NOEL WINN, will sit in the Queen's Bench Division. The net result of these changes in terms of manpower on the Bench means that the Queen's Bench Division has been strengthened by two, the Probate, Divorce and Admiralty Division—following the retirement of Mr.

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JUSTICE BARNARD—remains as it was, and the Chancery Division is left with one judge less. In terms of personalities Lord Morton, now aged 71, will be missed by the legal profession. After a brilliant career at Cambridge he was called to the Bar in 1912, took silk in 1929 and was appointed a High Court judge in 1938, sitting in the Chancery Division. From 1944 he was a Lord Justice of Appeal until his appointment as a Lord of Appeal in Ordinary in 1947. The appointment of Lord Justice Jenkins as a Law Lord is widely welcomed in the light of the high reputation which he has earned for himself as a judge. Born in 1899, he was called to the Bar in 1923, was appointed King's Counsel in 1938, a High Court judge (Chancery Division) in 1947, and a Lord Justice of Appeal in 1949. Mr. Marshall, 59, became a barrister in 1925 and a K.C. in 1947; he has been Recorder of the City of Coventry since 1952 and Chairman of Cornwall Quarter Sessions since 1957. Mr. Phillimore, 48, was called to the Bar in 1934, and took silk some eighteen years later; he has been Recorder of Winchester since 1954. Mr. Winn, 55, was called in 1928 and has been junior counsel to the Treasury since 1954. We extend our heartiest congratulations to the new judges and wish every one of them happiness and success in his new high office.

Contempt of Court

ALL are agreed that Parliament should change the law on contempt of court. Differences on detail are few and relatively unimportant so that there is every reason why the Government should introduce a short Bill in the present Session. The report published last week by *Justice* is an admirable and concise statement of what is needed. It suggests that every case should be governed by three basic principles: the first is that the court should retain a residuary power in all cases effectively to prevent interference with the course of justice by punishment for contempt; the second that proceedings should be instituted only if the Attorney-General in his discretion considers them necessary; the third that the court should not convict unless it considers that some substantial and unjustifiable interference with the course of justice has occurred. Subject to these rules, the report suggests that unintentional contempt should not be punishable, that the publication of matter relating to suspected persons should in some circumstances be capable of being treated as contempt, that criticism of a judge should not be contempt unless prejudice, corruption or other improper motive is alleged, and that no publication of anything relating to proceedings in chambers should of itself constitute a contempt unless they relate to an infant, lunatic or secret process or a fair trial might be prejudiced by the publication of interlocutory proceedings. The most important procedural changes proposed are that there should be a right of appeal and that the Court of Appeal and any judge of the High Court should be empowered to certify contempt in face of the court for trial by another judge of the High Court.

Medical Negligence

THE introduction of the National Health Service in 1948, followed shortly thereafter by legal aid being made available, brought in its wake greater litigation and threats of litigation against hospitals, surgeons and doctors. The LORD CHANCELLOR underlined this trend in the course of the Arthur Hall Memorial lecture which he delivered at Sheffield University on 3rd April. He recognised that the introduction and operation of legal aid had occasionally resulted in the institution of actions against doctors which ought not to have been brought. In the year ended 31st March, 1957, local legal aid committees considered 26,662 applications, of which 10,616 were rejected; during the same period assisted litigants lost 552 out of the 3,223 cases tried in the Queen's Bench Division. These figures illustrated that legal aid certificates were not granted as a matter of course. We should like to know if actions for negligence against members of the medical profession were proportionately less successful than all negligence cases brought by legally aided litigants. While the bringing of unmeritorious claims must be universally deplored, we are not convinced that the increase of litigation in respect of medical negligence is wholly bad. It may be that prior to the introduction of the National Health Service, when there was a prevailing feeling that it was not cricket to sue the voluntary hospitals, in some instances the standard of care shown was not as high as it should have been. The knowledge that any negligence may be followed by the taking of legal action by the patient, or his personal representatives, may act as a stimulus to the showing of care by the minority of medical practitioners whose standards might otherwise fall below what properly can be expected of them by their patients and colleagues alike.

Admission of Confessions

As Lord Sumner found in *Ibrahim* v. *R.* [1914] A.C. 599, "it has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." In *Ibrahim* v. *R.*, *supra*, ten or fifteen minutes after a soldier had been murdered an officer said to another soldier, the prisoner, who was then in custody: "Why have you done such a senseless act?" and the soldier replied: "Without doubt I killed him." It was held that this confession was a voluntary statement as it was not made either from fear of prejudice or hope of advantage. A rather similar point arose in *R.* v. *Smith* (1959), *The Times*, 26th March. A regimental sergeant-major heard that there had been some stabbing. Without delay he called a late night parade but, after each man had been questioned individually, nobody admitted being concerned in the incident. The sergeant-major then made it clear that he would keep the company on parade until someone admitted the stabbing, and when he heard this, the appellant stepped forward and said: "I did the stabbing." The Courts-Martial Appeal Court had no doubt that this statement was inadmissible as it was not made voluntarily. The sergeant-major's words were, quite clearly, a threat or, possibly, an inducement. However, at about 7.30 on the next morning a sergeant from the special investigation branch arrived to make inquiries. He saw the appellant who, after he was given the usual caution, again confessed to the stabbing. The appellant then signed a written caution and made a further statement in confirmation of his confession. The court came to the conclusion that the oral and written statements made to the sergeant of the special investigation branch were clearly admissible as, in the words of Lord PARKER, C.J., "the effect of any original inducement or threat under which the first statement was made had been dissipated."

CAPITAL MURDER AND THE THIEF

"In the result the law of homicide now resembles a heap of interesting but mostly useless objects jumbled together in a curiosity shop. An authoritative statement of the law of homicide is long overdue." So remarked the learned author of Kenny's Outlines of Criminal Law in 1951. The Homicide Act, 1957, is now in force, but it may be doubted whether its passing has clarified the situation. The tentative and compromising approach to the major question of the abolition of capital punishment has found favour in neither camp. Moreover, the introduction of a limited doctrine of diminished responsibility based on a mistaken conception of Scottish criminal law has, if anything, multiplied the issues and has already caused trouble in the case of *R.* v. *Dunbar* [1958] 1 Q.B. 1. More serious questions are, however, raised by the abolition of the doctrine of constructive malice and by the formulation of a new crime of capital murder which is alone punishable by death. One such capital murder is murder done in the course of theft.

Doctrine of constructive malice abolished

The 1957 Act, s. 1 (1), enacts that: "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence." In Pt. II of the Act, applicable to both England and Scotland, s. 5 (1) enacts: "Subject to subs. (2) of this section the following murders shall be capital murders, that is to say—(*a*) any murder done in the course or furtherance of theft." In essence, subs. (2) provides that where two or more persons are guilty of a murder which is a capital murder, only that person whose act caused the death of the murdered person is deemed to be guilty of capital murder. Subsection (2) may be ignored as it is not relevant to the present inquiry. Section 5 (5) (*c*) states that "theft" includes any offence which involves stealing or is done with intent to steal.

The effect of s. 1 (1) is to abolish the doctrine of constructive malice. It may be characterised as an antique survival in the law of homicide whereby a person might be found guilty of a crime in the entire absence of *mens rea*. According to the earlier statement of the law, where death occurred in the course or furtherance of a felony, malice aforethought was presumed. In the case of death occurring in the course of rape, it was no defence to prove that there had been no attempt to kill. In the famous case of the *Director of Public Prosecutions* v. *Beard* [1920] A.C. 479, a man who was partly drunk attempted to commit rape on a girl of thirteen years of age. In order to stifle her cries and to overcome her resistance, he placed his hand over her mouth and his thumb over her throat, thereby suffocating her. The jury's verdict of guilty of murder was ultimately restored by the House of Lords, who held that: "In *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape." The man's actual intention was irrelevant. Thus, in order that the doctrine of constructive malice should operate, it was necessary that a crime involving violence to the person should have been committed. This involved a slight narrowing of the ambit of the doctrine and thereafter the presence of violence was a *sine qua non*. The exact effect of the 1957 Act is best seen by referring to the case of *R.* v. *Vickers* [1957] 2 Q.B. 664. The facts are simplicity itself: Vickers broke into a cellar with the intention of stealing some of the contents. Having broken in, he was surprised by an elderly lady. In order to prevent recognition, he struck her several blows which proved fatal and then fled. The question in *Vickers* was as follows: was burglary the "other offence" mentioned in s. 1 (1) of the Act or was it the offence of causing grievous bodily harm? In other words, could the Crown prove malice aforethought by referring to the offence of burglary? It was held that it could not. Goddard, L.C.J., stated that: "It would seem clear therefore that the Legislature is providing that where one has a killing committed in the course or furtherance of another offence, that other offence must be ignored." The other offence is irrelevant in deciding whether the killing amounts to murder and the only circumstances to be looked to are the nature of the killing itself. The Act explicitly retained express and implied malice which are now the sole basis for determining whether malice aforethought exists or not. Thus, in deciding that the killing amounted to murder, the Lord Chief Justice stated: "He is guilty of murder because he has killed a person with the necessary malice aforethought being implied from the fact that he intended to do grievous bodily harm." The mechanics of the new doctrine are now apparent. In determining whether a killing amounts to murder, the fact that it was committed in the course or furtherance of, say, theft is irrelevant. But in order to secure a conviction of capital murder, it must be proved that the murder, now established as such, has been committed in the course or furtherance of theft. In the former case, the actual intention of the killer is irrelevant, but in the latter it is vital. It may be questioned whether by abolishing constructive malice the 1957 Act has, in this respect, radically altered the law. Admittedly, the judicial laxity in not applying the strict rule to abortions has now been regularised. But the dominant intention of the criminal is as irrelevant as ever and it may be that, in marginal cases, implied malice will assume the rôle formerly occupied by its compatriot constructive malice. Suppose a thief attempted to extort money by using a loaded firearm as a menace, and the victim accidentally sets off the gun, sustaining fatal injuries. If the rule of constructive malice in its pre-1957 form were applied, there would be no alternative to a verdict of murder. It may be doubted whether the passing of the Homicide Act has altered the position. The dominant intention of the criminal is irrelevant and the necessary malice aforethought will, in many cases, be implied from the injuries sustained by the murdered person where, formerly, it was construed. Thus the Homicide Act has mitigated the harshness of the doctrine of constructive malice without removing the anomaly that the criminal's dominant intention is not to be considered in determining whether the acts libelled amount to murder. Moreover, it is somewhat difficult to see why the criminal's intention is given no consideration in deciding whether the killing amounts to murder, but in deciding whether the murder is capital, it may hang him.

H.M. Advocate v. *Graham*

A capital murder is, *inter alia*, one done in the course of theft. The construction of the statutory phrase "in the course of theft" has already been the subject of controversy. One view, to be found in Lord Sorn's charge to the jury in *H.M. Advocate* v. *Graham* [1958] S.L.T. 167, is that a murder, done after the act of theft or in order to escape,

is committed in the course of theft and is a capital murder. At p. 169, Lord Sorn says: "I think that the course of theft is begun when perpetration is begun; that is to say, that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime: and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away . . . it still is murder done in course of theft. It would be, I think, somewhat ridiculous to suppose that Parliament has said: '"We will make it capital murder if the householder who wakes up and goes to interfere with a burglar . . . who kills him in order to go on with his stealing, but we won't make it capital murder if the burglar murders him in order to run away."' I think it does not matter what he was going to do afterwards, or what he did afterwards." It is immediately apparent that the scope of the statutory phrase "in the course of theft" is very wide indeed. In Lord Sorn's view it does not matter whether anything has, in fact, been stolen. As attempted theft is a crime necessarily involving the intent to steal, it falls within the ambit of s. 5 (5) (*c*) of the Act. This view, however, fails to distinguish murder done in the course of theft and murder done in furtherance of theft. It is submitted that they are two different things and, as seen later, they may be distinguished by referring to the time factor. The view expressed in *Graham* confuses the issue by including the crime of attempting to steal within the ambit of the phrase, "in the course of theft."

R. v. *Jones*

The decision in *Graham* was followed in the case of *R.* v. *Jones* [1959] 2 W.L.R. 190; p. 133, *ante*, where *J* broke into a store, went upstairs and stole money from an open safe. When he was about to return downstairs in order to collect some cigarettes belonging to the firm, he was surprised by the manager of the store, who turned on the lights downstairs. The manager then climbed upstairs and, in order to avoid detection, *J* struck him a fatal blow. *J's* evidence was that, when the lights were switched on, he immediately decided to leave without stealing the cigarettes downstairs and the murder was, therefore, committed after the completion of the theft. Thus the statutory phrase, according to this view, covers the cases where the only thought of the criminal is to avoid detection or to make his escape whether or not he has already stolen anything, and if he has, whether or not he can be proved to have intended to steal anything else. The opposing view, that the phrase "in the course of theft" covers only the case where a murder has been committed in order to facilitate a theft or in order to make it possible, was rejected by Lord Sorn. As Professor T. B. Smith puts it: "If the thief, in making his escape, deliberately kills a child who has witnessed the crime, he is apparently not guilty of capital murder—provided that he has the sense to use an axe, a bludgeon, a cord or so forth instead of a firearm." ([1957] S.L.T. (News) 129). This is relative to the view that theft is committed at a particular point of time and that the course of theft means, in effect, the act of theft. *Ammotio* together with *animus furandi* may be sufficient to constitute theft and the law of both England and Scotland has been concerned to establish that the degree of *ammotio* is irrelevant. An earring is stolen if it is pulled from the ear although it may be caught in the hair of the victim. Drawing a sword partially from its scabbard is theft. If the position of any movable object is infinitesimally altered *animo furandi*, then there is theft. This intention may be defeated in certain circumstances where, however, there may be an indictable attempt to steal. But it is conceived that any act done after the theft has been committed has not been done in the course of theft.

R. v. *Stokes*

The decision in the case of *R.* v. *Stokes* [1958] C.L.R. 688 apparently satisfies both views. In April, 1958, *S* had read an advertisement for a jobbing gardener and decided to apply for the post. He went to the address mentioned in the advertisement and there met an elderly lady who handed him gardening tools and proceeded to discuss the question of his wages. It appeared that she refused to pay him 4s. an hour but was willing to offer 3s. 6d. At length *S* became irritated and struck her on the head with his tools, inflicting fatal injuries. There was evidence to the effect that some few pounds had been in the house before the incident and that, on later examination, only a few pence were discovered. In the possession of *S* was found a wallet similar in character to one which had belonged to the lady. Immediately after the incident *S* travelled to London and it appeared from a statement which he had made to the police that he had intended to break and enter. It was clear that the murder was a means to the end, theft, which could not have been possible without it. That the application of s. 5 (1) (*a*) did not present any problems may be seen from a *dictum* expressed in the Court of Criminal Appeal, that on the evidence it would have been impossible for any other jury to come to any other conclusion than that the murder had been committed in the course or furtherance of theft.

Trial judges have been noticeably loth to enlarge on the interpretation of the phrase "in furtherance of theft." In *Graham*, Lord Sorn clearly believed that attempting to steal was an act in the course of theft. *Prima facie*, this is a difficult concept, as acts done to facilitate a crime are surely done in furtherance of that crime. This usually constitutes the crime of attempted theft, but is not always an integral part of perpetration and so is not in the course of theft. An act may be in furtherance of theft but may not constitute the crime of attempted theft. If a man carries a bag of thieves' tools to a house which he intends to rob, that is an act done in furtherance of theft but hardly an attempt to steal. When *animo furandi*, he opens a lockfast window by means of one of such tools, he is attempting to steal and is also acting in furtherance of theft, but the act or course of theft occurs when he begins to move the object which he intends to steal from its original position. By extending the category of acts done in the course of theft to include acts properly in furtherance of theft which constitute attempts, Lord Sorn leaves very little place for acts done in furtherance of theft. In *Graham*, his lordship was content to say: "We are not asked to say whether it was done in furtherance of theft . . ." But it would appear that, according to this view, only acts which do not constitute attempts are done in furtherance of theft. In the case of *Jones*, Parker, L.C.J., expressly declined to consider the interpretation of the statutory phrase "in furtherance of theft," while in *Stokes* the question did not arise.

What is "theft"?

Finally, what is "theft"? The law of larceny is another jumble of antiques which challenges reform. It was therefore something of a leap in logic to attempt to reform the law of homicide, at least where the crime of theft was involved, and to formulate s. 5 (1) (*a*) before rescuing the law of larceny from its parlous state. Something of the same position exists in Scotland. It may be questioned whether the crime of *furtum usus*, which is an innominate crime in Scots Law,

satisfies the definition of theft in the 1957 Act. Similarly, in England, some statutory offences are neither larcenies nor felonies but merely indictable offences punishable summarily. It is a petty offence, punishable summarily, to steal any plant, fruit, or vegetable from a garden or orchard: to steal any bird, beast, or other animal normally kept in confinement. It is a misdemeanour to steal a dog, if one had already been convicted of dog-stealing: the Larceny Act, 1916, s. 5. It is not immediately clear that this class of quasi-larcenies or innominate crimes amounts to theft or involves stealing, according to the terminology of the 1957 Act. It would be strange indeed if it were capital murder when the killing was committed in the course of stealing a vegetable but not in the course of attempting to commit rape.

It is submitted that the 1957 Act, in establishing a new crime of capital murder as a sop to the retentionists, has taken an illogical step. By enacting that murder done in course or furtherance of theft is capital murder, Parliament has ignored the confused state of the law of theft and kindred crimes, leaving the unenviable task of interpretation to the courts. It may be that the somewhat strange crime of capital murder will not remain long on the statute book, but there can be no doubt that its introduction has produced more problems than it has solved.

H. M.

Common Law Commentary

THE EMPLOYER'S DUTY TO PROVIDE SAFE TOOLS

DAVIE *v.* NEW MERTON BOARD MILLS, LTD.

WHAT is the extent of the employer's duty to provide reasonably safe tools for his employees? Is it sufficient if he buys his tools from a reputable supplier? Is the employer responsible for any latent defect in a tool which he provides for his employee to use? Various opinions have been voiced on these questions in recent years, and the Scottish courts have taken a different line from those in England. Matters reached the stage where there were conflicting decisions in both countries—a dilemma which required solution by an authoritative decision in the House of Lords. This decision was given recently in the judgments in the case of *Davie* v. *New Merton Board Mills, Ltd.* [1959] 2 W.L.R. 331; p. 177, *ante*.

The facts of this case were comparatively simple. A maintenance fitter was using a drift and a hammer during the course of his job when, at the second blow of the hammer, a particle of metal flew off the head of the drift into his eye. This occurred because the drift, provided by the employers for their servant's use, was excessively hard, and had been negligently manufactured. It had been purchased by the employers from a reputable firm of suppliers who had obtained it from reputable manufacturers. The employers' system of maintenance and inspection was not in fault. The plaintiff sued both employers and makers, but the Court of Appeal (Jenkins, L.J., dissenting) exonerated the employers for having done all they reasonably could. On appeal, the House of Lords confirmed this decision unanimously, holding that the employers had discharged their duty to provide a reasonably safe tool by buying from a reputable source a tool whose latent defect they had no means of discovering.

The extent of the duty

The broad principles of the employer's duty are laid down in the familiar passage of Lord Herschell's in *Smith* v. *Baker & Sons* [1891] A.C. 325, at p. 362, where he states that the employer's duty is to take reasonable care to provide proper appliances and to maintain them in a proper condition. The difficulty in *Davie* arose not on the primary question of liability, but upon the question—for whom was the employer responsible? Undoubtedly the employer is responsible for his own acts and for those of his servants. But is he responsible for the negligence of his supplier, whether he is called an "agent" or an "independent contractor"?

Clearly, a manufacturer who supplies tools through a retailer to an employer cannot in the ordinary legal sense be regarded as his agent—except, possibly, where the manufacturer makes tools to the employer's own design and specification. Can the manufacturer then be considered as an independent contractor for whom the employer is liable? Viscount Simonds in his judgment in *Davie* sharply rejects this view, saying that "it is perhaps a striking commentary on the artificiality of this concept that it should for a moment be thought possible to regard as an independent contractor with an employer a manufacturer with whom he never contracted, of whom he may never have heard, and from whom he may be divided in time and space by decades and continents."

The Scottish view

Nevertheless, the Scottish view, which also appealed to Jenkins, L.J., in his dissenting judgment, was that it did not matter whether the person employed to do the work for the employer was a servant or an agent, or whether he was an independent contractor—the employer was still liable.

This view derives from one approach to the leading case of *Wilsons and Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57, a Scottish appeal to the House of Lords. That case laid down that the employer's duty to take reasonable care for the safety of his servants was a duty personal to the employer, who could not divest himself of it by entrusting the performance of it to any servant or agent however competent. One interpretation of this view is that the personal liability of the master in regard to plant and tools covers the activities of any person whom the master employes to provide that plant.

There is, however, another approach to *Wilsons'* case, which was preferred by Viscount Simonds. The question to be decided in *Wilsons* was whether a mine manager, in performing the owner's duty of providing a safe system of working, was in common employment with an ordinary workman in the mine. The problem was thus one of accommodating the spheres of operation of the competing doctrines of vicarious liability and of common employment. Throughout that case, it was assumed that the mine manager whose negligence had caused the accident was *a servant* of the employer, and no question ever arose as to who should be regarded as a servant for whose negligence the employer might be held liable. This, of course, was exactly the question in *Davie*, and nothing said in *Wilsons* can be taken as relevant to that point. On one view, therefore, anything said in *Wilsons* about the possible liability of the employer for the negligence of persons *other than servants* is strictly *obiter*.

Jenkins, L.J., indicated in his dissenting judgment in the Court of Appeal ([1958] 2 W.L.R. 21) that no distinction should be drawn between a servant or agent (in the strict sense) of the employer and an independent contractor engaged by the employer. In support of this view he quoted the case of *Thomson* v. *Cremin* [1956] 1 W.L.R. 103*n.*, where it was held that an employer did not fulfil his duty to invitees to provide safe premises (in that case, the hold of a ship) merely by leaving the work to contractors, however reputable they may have been. *Davie* was *a fortiori* of this, it was suggested, since the duty of master to servant was higher than that of invitor to invitee.

There are numerous other Scottish cases which appeared to support, in varying degrees, the plaintiff's contention that the employers were liable. These cases were considered at some length by the two Scottish Lords of Appeal, Lord Reid and Lord Keith. In particular may be mentioned the case of *McDonald* v. *Wyllie & Sons* (1898), 1 F. 339, where a firm of builders engaged in taking down a high wall contracted with a firm of joiners for the construction of a scaffold which later collapsed and injured an employee of the builders. It was held on appeal that a direction to the jury to the effect that the builders had discharged their whole duty to their employees by selecting a firm of skilled joiners to do the work was erroneous.

Donnelly v. *Glasgow Corporation*

The most recent Scottish case, however, and the most important one from the point of view of the plaintiff in *Davie*, was the case of *Donnelly* v. *Glasgow Corporation* [1953] S.C. 107. That case was concerned not with defective tools, but with defective plant, and there was also no intervening supplier between the employer and the manufacturer, but otherwise the case was a valuable precedent. In *Donnelly*, the driver and conductor of an omnibus belonging to the corporation suffered personal injuries through an accident which was caused by defects in the chassis of the bus. The corporation admitted that the accident had been caused by these defects, but claimed that they were latent defects of design, and that they had discharged their duty by buying the chassis from a reputable manufacturer. This plea was rejected by the Lord Justice Clerk (Thomson) giving the opinion of the court, who said "the supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error." Viscount Simonds described this as a broad generalisation which went too far, and the case has now been expressly overruled.

Resolving the difficulty

How has the wide divergence between Scottish and English authority arisen? The scapegoat must be *English* v. *Wilsons* and the varying interpretations which have been put on it. This can be seen by considering the main arguments advanced on behalf of the employee in *Davie's* case. It was said that the employer was under a duty to take reasonable care to supply his workmen with proper plant and machinery, including tools such as drifts. It was then said that the employer could not escape responsibility by employing a third party, however expert, to do his duty for him. Thus far, there is clear authority in the cases. What causes difficulty is the next step, or as Viscount Simonds calls it—"a jump, and a jump that would unhorse any rider." Therefore, continues the argument, the employer is responsible for any latent defect in goods that he buys in the market, if it can be shown that it was caused by negligence in manufacture. This is the obstacle upon which the argument falters. According to Viscount Simonds, it cannot properly be said that the manufacturer is a person to whom the employer "delegates a duty" which it is for him to perform. Nor can the manufacturer on any view be treated merely as an agent of the employer, for whose acts the employer is responsible.

That was the view reached by the House of Lords after hearing prolonged argument and lengthy citation of cases. But it is also the common sense view of one judge, which he arrived at "unembarrassed" by any citation of authority. The case was *Mason* v. *Williams and Williams, Ltd.* [1955] 1 W.L.R. 549, where Finnemore, J., said that if employers bought their tools from well known makers, they were entitled to assume that the tools would be suitable for their intended purpose, and would not require daily or monthly inspection to see that all was well. This remarkably percipient decision is one of those rare cases which suggest that the whole massive system of judicial precedent and appeal to the House of Lords might not be the best system after all!

Consequences of *Davie*

The decision in *Davie* v. *New Merton Board Mills, Ltd.*, will be one of considerable importance. If the decision had gone the other way, of course, a whole fresh development of law extending the employer's liability could have been expected. As it is, the case will remain a significant demarcation point against the growing tendency to increase the employer's liability. In passing, one must note with regret that the employee, through no fault of his own, may now have increased difficulty in pressing a successful claim for damages. Since he cannot now sue his employer in respect of a negligently manufactured tool, he must seek his remedy against the manufacturer—but it will not always be an easy task to discover who the manufacturer was. The tool may be quite old, and the manufacturer may have gone out of business; the tool may be one of those specialised kinds manufactured only on the Continent or in the United States; and unless the tool is stamped with the manufacturer's name then the employee, even with the co-operation of his employer, may never be able to discover where it came from. From this point of view, at least, the decision of the House of Lords is unfortunate.

Certain important pronouncements on law sometimes escape notice in the headnote of the reports, and this appears to have happened in *Davie's* case. Where actions between master and servant are concerned, and also in motor accident cases, it may be just possible to detect from the decision a slight bias in favour of the injured party, resulting from an assumption that the defendant will be insured and will not have to pay any damages out of his own pocket. It was discreetly suggested in *Davie* that the House should take into consideration the fact that it was likely that the employer, but not the workman, would be covered by insurance, and for that reason the court should be more ready to fasten upon the employer the liability for an accident due neither to his nor the workman's carelessness. Viscount Simonds directed that the "fortuitous circumstance" of insurance was not a factor to which any consideration should be given.

N. G.

Personal Note

Mr. William Ralph Cockain, solicitor, of Derby, was married recently to Miss Wendy E. Roper.

The Practitioner's Dictionary

"AS SOON AS POSSIBLE"

WHERE an act is to be performed "as soon as possible" it is now established that something more than execution within a reasonable time is required.

The decision of the Court of Appeal in *Hydraulic Engineering Co., Ltd.* v. *McHaffie, Goslett & Co.* (1878), 4 Q.B.D. 670, is important in this connection. The defendants contracted with the plaintiffs in July for the manufacture of a part of a machine "as soon as possible," well knowing that the article was wanted by the plaintiffs by the end of August. In fact, it was not delivered until the latter part of September, because the defendants were without a foreman competent to prepare certain patterns which were essential to the manufacture of the article in question. The court found that the defendants were in breach of their contract, and Bramwell, L.J., declared that "'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practical time."

The defendants contended that the decision of the Court of Common Pleas in *Attwood* v. *Emery* (1856), 1 C.B. (N.S.)110, gave the phrase a wider construction, but his lordship thought that that decision did not go further than to say that if a tailor accepts an order to make a coat "as soon as possible," he need not put down a half-made vest in order to begin the coat as every customer knows at the time of giving an order that the manufacturer or tradesman may have other orders on hand. If *Attwood* v. *Emery, supra*, did go further than he believed, he (Bramwell, L.J.) could not agree with it, but Brett, L.J., did not think that the earlier case decided anything which could not be fully adopted and reconciled with the decision which they were then making.

The definition advanced by Bramwell, L.J., in the *Hydraulic Engineering* case was approved by Dysart, J., in the Canadian case of *Kings Old Country, Ltd.* v. *Liquid Carbonic Canadian Corporation, Ltd.* [1942] 2 W.W.R. 603. It appeared that there was a contract for the sale and delivery of an automatic bottling machine which provided that the machine was to be shipped by the manufacturers "as soon as possible." The court decided that the effect of the undertaking to deliver the machine "as soon as possible" was that it was to be delivered within a reasonable time, the understanding being that it was to be done within the shortest possible time.

The meaning of the expression "as soon as possible" was also considered in *Verelst's Administratrix* v. *Motor Union Insurance Co., Ltd.* [1925] 2 K.B. 137, where a policy of insurance stipulated that notice of an accident should be given to the insurance company "as soon as possible" after the occurrence of the accident. The insured was killed in a motor accident in India in January, 1923. Although her personal representative knew of the death within a month the existence of the policy was not discovered until January, 1924, and notice was given to the company as soon as possible after the policy came to light. The court decided that the arbitrator was entitled to find that notice had been given to the company "as soon as possible" as all the circumstances should be taken into account, including the available means of knowledge of the insured's personal representative of the existence of the policy and the identify of the insurance company. In the course of his judgment, Roche, J., accepted the suggestion that the phrase "as soon as possible" meant "as soon as possible in the circumstances which prevail and apply to" the personal representative.

D. G. C.

GOVERNMENT OF COUNTY SCHOOLS

SECTION 17 of the Education Act, 1944, requires that for every county school and for every voluntary school (the latter being a school maintained by a local education authority but enjoying the voluntary status granted under the 1944 Act), there must be an instrument providing for the constitution of the governing body known as managers in the case of primary schools and as governors in the case of secondary schools. The document providing for the constitution of the governing body is known as an instrument of management in connection with the body of managers of a primary school and as an instrument of government in respect of the body of governors of a secondary school (s. 17 (1)). These instruments are made by an order of the local education authority in the case of a county school and by an order of the Minister of Education in the case of a voluntary school (s. 17 (2)).

The general rule (subject to the provisions of the 1944 Act and of any trust deed relating to the school) is that every county primary school and every voluntary primary school must be conducted in accordance with rules of management made by an order of the local education authority; and that every county secondary school and every voluntary secondary school must be conducted in accordance with articles of government made in the case of a county school by an order of the local education authority and approved by the Minister, and in the case of a voluntary school by an order of the Minister. The articles must in particular determine the functions to be exercised in relation to the school by the local education authority, the body of governors and the head teacher respectively (s. 17 (3)).

Ministerial power to modify trust deed

Any difficulty which might arise by a conflict between what it is desired to include in the instrument or rules of management, or the instrument or articles of government, and what is contained in any trust deed relating to the school, is resolved by s. 17 (4) of the 1944 Act empowering the Minister to make by order such modifications in the provisions of the trust deed as appear to him to be just and expedient for that purpose. Before making any order under s. 17 in respect of any school, however, the Minister must give an opportunity to the local education authority, and to any other persons appearing to him to be concerned with the management or government of the school, to make representations to him. In making any such order the Minister is enjoined to have regard to all the circumstances of the school, and in particular to the question whether the school is, or is to be, a primary or secondary school, and, in the case of an

existing school, to the previous manner of conducting the school (s. 17 (5)).

Constitution of governing body

The instrument of management for every county primary school serving an area in which there is a minor authority must provide for the constitution of a body of managers consisting of such number as the local education authority determines not being less than six. Of these, two-thirds are appointed by the local education authority and one-third by the minor authority (s. 18 (1)). If there is no minor authority in the area, then the constitution of the body of managers may be determined by the local education authority (s. 18 (2)). "Minor authority" in general means the council of any borough (other than a county borough) or urban district or rural parish which appears to the local education authority to be the area served by the school (s. 114 (1)); as regards London in this context, references to a borough must be construed as references to the City of London and to a metropolitan borough, and references to the council of a borough must be construed as references to the Common Council of the City of London and to the council of a metropolitan borough respectively (s. 117 (1)).

The Minister's sanction, given after consultation with the local education authority, is required in connection with the instrument of management or government for every voluntary primary school (s. 18 (3)) and voluntary secondary school (s. 19 (2)). The instrument of government for every county secondary school must provide for the constitution of a body of governors consisting of such number of persons appointed in such manner as the local education authority determines (s. 19 (1)). Managers and governors are not paid for the services or reimbursed for any out-of-pocket expenses.

A local education authority may arrange for schools in its area to be grouped under one management (s. 20).

Proceedings of governing body

Some general rules are provided in the 1944 Act for the proceedings of school managers and governors (s. 21 and Sched. IV). Any manager or governor may resign his office or be removed by the authority which appointed him. The minutes of the proceedings of managers and governors, to be kept in a book provided for the purpose, must be open to inspection by the local education authority. A minimum quorum for a meeting of managers and governors is three or one-third of the whole of their number, whichever is greater. Their proceedings cannot be invalidated by any unfilled vacancy or any defect in the election, appointment or qualification of one of their number. A majority vote determines all questions and the chairman of the meeting has a second or casting vote. A meeting, which must be held at least once a term, may be convened by any two managers or governors.

The body of managers or governors of a county school is not an independent statutory authority but is the agent of the local education authority which thus remains liable for accidents due to the negligent disrepair of the school premises (*cf.* Halsbury's Laws, 3rd ed., vol. 13, p. 615, note (*r*)).

Generally, any dispute between a local education authority and the managers or governors of any school may be determined by the Minister (s. 67), who is empowered to prevent unreasonable exercise of functions on the part of any local education authority or managers or governors of any county or voluntary school (s. 68). The Minister may act in the event of any of those authorities failing to discharge any duty imposed upon them (s. 99).

Application of statutory powers

So much for the statutory background to the government of county schools. Let us now consider the application of the statutory powers in practice. It will be appreciated that variations will be found in different parts of the country owing to the fact that, as a matter of policy, local education authorities enjoy much independence of the central Government in connection with the detailed administration of schools in their charge. In England and Wales there are over 30,000 schools maintained or assisted by local education authorities employing over 250,000 full-time teachers to look after some 6,750,000 pupils. Of those schools, over 18,000 are primary or secondary county schools with some 188,000 teachers and 5,000,000 pupils. These figures can be contrasted with those in respect of independent schools which, in round figures, number 5,000 and employ 34,000 full-time teachers for their 500,000 pupils.

For a detailed discussion of the government of county schools to be kept within reasonable length, it is necessary to select an area and then a type of school within that area.

London county secondary education

The scale on which it is necessary to tackle administration of education is nowhere larger than in London. In 1957–58 over 440,800 pupils were on the rolls of schools administered by the London County Council; of those pupils, nearly 170,800 were attending secondary schools. In that year nearly £46,750,000 was spent on State education in London, of which over a quarter was allocated to secondary schools. Something under £22,500,000 of the total sum was found by way of Exchequer grant. The net cost of nearly £20,500,000 falling on the rates was the equivalent of 4s. 3d. in the £.

It is proposed to consider in some detail the instrument and articles of government of a London county secondary school promulgated by the London County Council under the powers conferred by the 1944 Act.

The total number of governors is twelve. Ten of these are representative governors appointed by the council; one of the ten is appointed on the nomination of the University of London and the remaining nine find their way to the governing body through political channels, although they are not necessarily members of the county council or a borough council (though many of them are). The governors are normally appointed for a term of three years ending on 31st August in the year of the general election of county councillors; the term of the present governors ends on 31st August, 1961. At the first meeting of governors held after their appointment two co-optative governors are appointed by resolution of the governors. It is open to any governor to propose candidates for co-option. Casual vacancies amongst governors may be filled but an appointee holds office only for the unexpired term of office of the governor in whose place he is appointed.

Persons who may not be appointed governors

No employee of the council may be appointed nor (with minor exceptions) may a former officer or employee of the council who has previously been employed at the school. No relative of a member of the staff of the school may be a

governor there and a former pupil may not be appointed until ten years after the date of his leaving school.

Any governor who fails to attend all meetings in one year or is adjudicated a bankrupt or is, in the opinion of the appointing body, incapacitated from acting, thereupon ceases to be a governor.

Governors' powers

Detailed provisions concerning governors' powers and procedure to be followed are contained in the articles of government. The governors elect a chairman and vice-chairman from their number at the first meeting held in every school year in respect of that year. A divisional officer of the council acts as clerk to the governors for the education officer, notifies the governors of date, time and place of meetings and keeps the minutes of proceedings. In fact the divisional office has to handle necessary correspondence and prepare, anyway in outline, the documents which the governors are required to submit to the council, such as an estimate of the income and expenditure required for the purposes of the school for each financial year ending 31st March.

The general educational character of the school and its place in the council's educational system are determined by the council. Subject to that, the governors exercise oversight of the conduct and curriculum of the school in consultation with the head master who has the day-to-day control but must consult the chairman of the governors as necessary. Any suspension of a pupil must be referred to the governors who must consider any appeal made to them by a parent of the pupil.

All reports of inspectors, whether they be from H.M. inspectors, received from the Minister of Education or from the council's inspectors, must be referred to the governors. After consulting the head master they must inform the council what, if any, action is being taken and what is recommended in the light of the report.

Position of governors in relation to staff

Head master

In the event of a vacancy of head master (or head mistress of a girls' school) arising, in certain circumstances the council may require the governors to agree to the appointment of a particular candidate, for example, a head master returning to its service after secondment to another post. In the event of the vacancy's being advertised the governors must submit not less than three names to the council recommending, if they so desire, the person whom they consider should be appointed. One of the governors attends the meeting of the appropriate sub-committee of the council's education committee considering the matter but he may not vote in that capacity alone. After his appointment a head master is entitled to attend any meeting of the governors except when for good cause they decide otherwise.

To be effective, a recommendation for the dismissal of a head master requires a special meeting of the governors called for the purpose. Two-thirds of the whole number of governors must concur in any such recommendation then passed which must be confirmed by a resolution similarly passed at a further special meeting held not less than fourteen days after the date of the meeting at which the original resolution was passed. The head master, accompanied by a friend, is entitled to be present at any meeting of governors at which a question involving his dismissal is to be considered. At the request of the governors, or on his own initiative, the council's education officer may suspend the head master from office pending the council's decision.

Assistant master

Governors, after consultation with the head master—and often in practice a council schools' inspector of the appropriate faculty—are entitled to nominate a candidate for appointment, if necessary, to the council's service and for assignment to the school as assistant master; and to make recommendations for appointments to posts carrying allowances over and above the Burnham Scale salary. The governors must report whether the probationary period of any assistant master assigned to the school has been satisfactorily completed and for this purpose they must pay regard to recommendations made by the council's inspector and the head master.

The procedure relating to the dismissal or suspension of an assistant master is identical with that specified for head masters.

Members of the teaching staff are entitled to make representations to the governors, provided that due notice has been given to the head master.

The governors also exercise certain powers in relation to the appointment of such non-teaching staff as schoolkeepers.

No relative of a governor is eligible for appointment to the school in any capacity.

Minor expenditure permitted

Subject to any direction of the council, governors may authorise certain minor expenditure. Direct purchases may be made of items covered by the school capitation allowance. These items consist of small apparatus, books, stationery, consumable materials and other items normally requisitioned through formal channels within that allowance and not in excess of 10 per cent. of the approved estimate for the school under that heading in any one financial year or a sum of £20, whichever is the greater. Minor alterations and repairs to the school buildings, not involving structural alterations, may be sanctioned provided that the expenditure is within the amount provided for the purpose in the approved estimate and does not in any one case exceed £40 for alterations or £25 for repairs. Works over those limits and alterations or repairs affecting electrical and engineering installations, heating, hot water or drainage systems, fire preventive works or means of escape may only be executed under the direction of the appropriate chief officer of the council.

Governing body not a dynamic force

From the foregoing it will readily be appreciated that the governing body of a London county secondary school cannot be a dynamic force in view of the limitations on its powers. With such a stringent ceiling on expenditure, for example, the complicated process of appointing the twelve members of any one governing body hardly seems to be justified.

Governors are entitled to forward resolutions for consideration by the council's education committee. In practice these resolutions are referred to the appropriate sub-committee. That many such resolutions are not acted upon can be surmised from the rule that a recommendation not adopted by the council may not (save in exceptional circumstances and with the special sanction of the chairman of the appropriate sub-committee of the council's education committee) be re-submitted within a period of six months from the date on which the decision not to adopt the recommendation was reached.

In practice, one of the most useful functions of the governors is to support the head master in any difficulties that he may encounter in obtaining his requirements from or in pressing requests upon the council.

D. N.

A Conveyancer's Diary

TAX-FREE ANNUITIES

THE legislation concerning certain pre-war annuities given free of tax continues to give trouble. This legislation was introduced in s. 25 of the Finance Act, 1941, as an obvious emergency measure, was amended by s. 20 of the Finance (No. 2) Act, 1945, to give it more permanent form, and is now found in s. 486 of the Income Tax Act, 1952. The difficulty is in the language of subs. (1), which provides that any provision, however worded, for the payment whether periodically or otherwise of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, and (*b*) was made before the 3rd September, 1939, and (*c*) has not been varied since that date, shall, as respects payments falling to be made in any year of assessment the standard rate of income tax for which exceeds 5s. 6d. in the pound, have effect as if for the stated amount thereof there were substituted an amount equal to the fraction thereof calculated in accordance with subs. (5) of this section. (The fraction in any year for which the standard rate is at the 8s. 6d. level is 20/29ths.) There are thus three conditions which the " provision " has to satisfy if the section is to apply, (*a*), (*b*) and (*c*), but the conditions are not grammatically of the same kind, and the question which has troubled the courts more than once is the meaning to be given, in this context, to " provision." Does it mean the instrument or part of an instrument under which the payment is made, or the beneficial interest thereby created ? They may not be contemporaneous.

Decision and reversal

The simplest case may be illustrated by *Re Waring* [1942] Ch. 426. A testator by his will, which was made before the 3rd September, 1939, gave annuities free of tax. He died after the 3rd September, 1939. The Court of Appeal held that the words " was made " in condition (*b*) referred to the date when the will was executed, and not to the date when it came into operation on the testator's death. The section therefore applied to reduce the liability of the testator's estate in respect of the tax on the annuities. This decision involved the construction of " provision " in the first of the two alternative methods which I have suggested. In *Berkeley* v. *Berkeley* [1946] A.C. 555, however, the House of Lords adopted the other of the two constructions, and in effect reversed *Re Waring*.

The facts in *Berkeley* v. *Berkeley* were complicated and very special, and there is no need to recapitulate them here ; the gist of the decision can be appreciated if the simple problem in *Re Waring* is kept in mind : when is a testamentary " provision " made—at the date of execution, or at the date of death ? The majority of the House of Lords held that it was not made until the death. Of the two possible meanings which " provision " may bear in this section, either in this view was appropriate in para. (*a*) or in para. (*c*), for either the clause providing the benefit or the benefit itself may be said to be " contained in any deed," etc., or be " varied " (or, rather, not varied) before the specified date. But the only meaning which is appropriate to " provision " when it is said to be " made " before the due date in para. (*b*) in all the cases in which this section can apply (*viz.*, the case where the " provision " was " made " before the 3rd September, 1939, by a non-testamentary as well as by a testamentary instrument) is the benefit created. In every case other than that of a provision contained in a will, the situation dealt with by para. (*a*) was that of a right which had accrued before the 3rd September, 1939. In the case of a will executed before that date, the testator was in a position of his own motion to provide for a reduction in the liability imposed on his estate by the increase of taxation as a result of the war. In all the other cases dealt with, the donor or settlor was not in such a position, and for this reason required the relief given by this section. Congruity in construction, therefore, demanded that in the case of a testamentary disposition provision was only " made " before the 3rd September, 1939, if the disposition took effect by the death of the testator before that date.

Application of *Berkeley* v. *Berkeley*

The decision in *Berkeley* v. *Berkeley* has recently been examined in *Re Westminster's Deed of Appointment* [1959] 2 W.L.R. 299 ; p. 156, *ante*. As in all these cases, the facts were in detail complicated, but may be reduced to a simple statement which will bring out the point which was decided. By a deed executed in 1930, *W* appointed a rent-charge and covenanted to pay a further yearly sum to the defendant, the effect being that the defendant was thereby assured of a yearly net sum of £6,000 free of income tax and surtax, such sum to become payable after the death of *W*. *W* died in 1953, and his executors (the plaintiffs) therefore claimed that s. 486 of the Income Tax Act, 1952, applied to reduce the amount of tax payable in respect of the yearly sums. Danckwerts, J., held that the section did not apply, feeling himself bound to come to this conclusion by the decision in *Berkeley* v. *Berkeley*. He took it that the effect of the view there expressed by the majority of the House had been to lay it down, not only in the case of a will, but in all cases, that a " provision made " meant, for the purposes of the section, a provision which had become effective in possession or enjoyment. In this case, that was not until the death of *W*, when the annual sums began to be payable, i.e., after the 3rd September, 1939. The learned judge appears to have been particularly influenced in coming to this decision (which was contrary to that which he would have reached if the matter had not been, as he thought, concluded by *Berkeley* v. *Berkeley*) by a passage from the speech of Lord Simon in that case : " There is a clear distinction shown in the section between a provision ' contained ' in a document irrespective of date and a provision ' made ' before the 3rd September, 1939. Language is very ineptly used if one speaks of ' making ' a clause. It is not the instrument, but the provision, for which a latest date is prescribed. Moreover, all the other documents mentioned except a will or codicil are such as would confer a vested right to the payment of the amount free of tax—a benefit which was created at a time when income tax at 10s. in the pound was in no one's thoughts."

The benefit provided for the defendant in the present case was, of course, not a vested benefit, but a contingent benefit, contingent on the defendant surviving the covenantor, *W*. (The appointment and covenant were made in contemplation of, and were therefore also, as it happens, contingent upon the solemnisation of, the marriage between the defendant

and *W*. This only reinforced the contingent quality of the benefit.) It was upon this circumstance, coupled with the deduction which Danckwerts, J., drew from the speeches of the majority in *Berkeley* v. *Berkeley*, that the decision at first instance rested. This decision was reversed by the Court of Appeal. In the view of that court (and I take the grounds of the decision from a passage in the judgment of Romer, L.J., where they are succinctly stated), the interest which was created by the covenant in favour of the defendant was the right, on a future contingency, to receive a tax-free annuity out of the covenantor's estate. At the relevant date, the 3rd September, 1939, there was therefore an irrevocable future obligation on the covenantor's legal personal representatives to pay the annuity out of the assets of the estate if the contingency occurred, namely, if the covenantor died leaving the defendant surviving; and a corresponding right was vested in the defendant to receive it. There was no power reserved by the covenantor under which the defendant could be deprived of the right to receive the annuity if she survived her husband, and no power to release the covenantor's estate from liability to pay it. It followed, therefore, that a beneficial interest was conferred on the defendant by the deed of 1930.

As it had been held, in effect, in *Berkeley* v. *Berkeley* that " provision " in the section meant the beneficial interest created and not the instrument which created it, the section applied to the deed. " On the 3rd September, 1939, the defendant's position was that the interest which she then had under the deed was a contingent legal right to a future annuity which would ripen into a present payment if she survived her husband; and I agree . . . that the relevant date to consider is the date when this contingent right to receive the annuity was conferred and not the date when the annuity should become presently payable, if it became payable at all " (*per* Romer, L.J.).

Two other cases were mentioned by the Master of the Rolls in his judgment as not being covered by authority, and on these cases he expressed no view. There was, first, the case of an appointment executed before the 3rd September, 1939, containing an unqualified power of revocation, by an appointor who dies after that date. The second was the case which occurred in *Re Waring*, with the variation that the testator had before the 3rd September, 1939, executed a covenant not to revoke his will. The possibilities of litigation on s. 486 are clearly not exhausted yet.

" A B C "

Landlord and Tenant Notebook

CHANGE OF INTENTION

THE " Notebook " once made the facetious suggestion that a landlord, when notifying his intention to oppose an application for a new tenancy of business premises, might specify all the seven grounds set out in the Landlord and Tenant Act, 1954, s. 30 (1). The decision in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* [1958] 2 W.L.R. 513 (H.L.); 102 SOL. J. 228, might be said to have warranted the insertion of a " semi- " before the " facetious " : it was finally held that, when an intention to do something was part of the ground, that intention must exist at the date of the hearing of the application for the new tenancy (see 102 SOL. J. 263). And if the landlords in the recent case of *Nursey* v. *P. Currie (Dartford), Ltd.* [1959] 1 W.L.R. 273 (C.A.); p. 221, *ante*, had, when serving notice to terminate under s. 25, fulfilled their subs. (6) obligation to " state on which of the grounds mentioned in s. 30 of this Act " they would eventually oppose an application by stating that on the termination of the current tenancy they intended to demolish the premises comprised in the holding (s. 30 (1) (*f*)) and/or to occupy the holding for the purposes of a business to be carried on by them therein (*ibid.*, (*g*)), they might have been in a better position.

The position in which they actually were came about as follows: They had granted a quarterly tenancy of some buildings—" drivers' room, can store, pump and spirit store, together with the right of ingress and egress thereto " (there was nothing about " therefrom " !), these buildings standing in a yard which was part of premises in which they carried on a garage business. In 1955 they had made two unsuccessful town planning applications for permission to develop that yard as a petrol-filling station. On 8th December, 1957, they served the tenants with a s. 25 notice stating that they would oppose an application for a new tenancy on the ground of intention to occupy the premises for the purposes of their own business. The tenants served the necessary counter-notice in February and filed their application in April. Then, in June, planning permission was granted—the original plan being modified by providing for a car park behind the pumps. The application came to be heard on 17th July.

Despite the " change of outlook "—and it was not disputed that on 17th July they intended to clear away the buildings—the county court judge decided that on 17th July the landlords intended to occupy the holding for the purposes of a business to be carried on by them therein. The Court of Appeal thought otherwise.

The holding

Both s. 30 (1) (*f*) and s. 30 (1) (*g*) require an intention to do something on the termination of the current tenancy; but the subject-matter of that intention is, in the one case, " the premises comprised in the holding or part thereof "; in the other case, " the holding." And in the opening section of Pt. II of the Act, s. 23, " the holding " is defined (subs. (2)) as " the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

Without referring to the exclusion, the Court of Appeal decided that the definition made it necessary to concentrate the whole of one's attention on the particular piece of land, whether it had buildings on it or not, which was the subject-matter of the tenancy in question; and the tenancy agreement described the premises as " *the buildings* forming part of the premises known as . . . and comprising the drivers' room, can store, pump and spirit store." The only intention proved was an intention to demolish and reconstruct; and there was no power to amend.

The comment that invites itself is that the word " property " in the definition appears to have been strictly construed. Suppose that the " parcels " in the agreement, instead of being described as " buildings," had been defined by reference to a plan delineating the sites of the four edifices, which would have " passed " them : could it not be said that the lordlords intended to occupy the property comprised in the tenancy for the purposes of a business to be carried on by them therein ? In support of this view, it could be pointed out that the object of the definition is to enable special provision to be made for " combined premises " ; it is the exclusion of non-business parts that is the essential feature, as is seen when one comes to s. 32, headed " Property to be comprised in new tenancy " : *prima facie*, the new tenancy is to comprise the holding, but the landlord is entitled to insist on the inclusion of other property comprised in the current tenancy. This, it might be said, invites a more liberal interpretation of the expression " property."

Again, suppose that before the date of the hearing the buildings—at least three-fourths of which appear to have been of a somewhat inflammable nature—had been burned down ? Could it not have been said that the landlords—at the vital date—intended to occupy the property for the purposes of a business to be carried on by them therein ?

The vital date

When observing that there was no right of amendment, Wynn Parry, J., used the adverb " unfortunately." As mentioned, *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.*, has decided that the landlord has to prove the existence of the intention at the date of the hearing, though he has had to notify it well before ; and only Parliament can dispose of the difficulties thus created. So it is useless to bewail—though I may perhaps point out that the dissenting judgment delivered in the Court of Appeal by Lord Evershed, M.R. (invoking the ordinary standards of common sense) has the cogency of many of the provoking dissenting judgments delivered by Fletcher Moulton, L.J., and the same may be said of Lord Keith's dissenting speech in the House of Lords. This was gone into in the " Notebook " for 12th April, 1958 (102 Sol. J. 263—the article being headed " Intending to Intend ").

Two purposes

The landlords in *Nursey* v. *P. Currie (Dartford), Ltd.*, sought support from *Fisher* v. *Taylors Furnishing Stores, Ltd.* [1956] 2 Q.B. 56 (C.A.), in which landlords, disqualified by the five-year rule from opposing on the ground of intention to occupy for their own business, established an intention to demolish and reconstruct, and were held entitled to succeed though the demolition and reconstruction would be followed by occupation for their own business. " In many cases the landlord will have two purposes, both of which are genuine and important . . . The fact that he cannot establish one ground does not prevent him from relying on another " (Denning, L.J.). But application of this statement could not affect the validity of the " holding " point.

The position may, in my submission, be said to be as follows : if a landlord is, at the date of the hearing, in two minds, it does not matter as long as one is or both are of the right kind. In *Fisher* v. *Taylors Furnishing Stores, Ltd.*, one was of the right kind. This would apply even if the other had nothing to do with the Act : see *Espresso Coffee Machine Co., Ltd.* v. *Guardian Assurance Co., Ltd.* [1959] 1 W.L.R. 250 (C.A.) ; p. 200, *ante* (discussed at p. 265, *ante*). But the right kind must have been notified in the notice to terminate or notice to oppose request and must exist at the date of the hearing.

A contrast

From a landlord's point of view, the much abused Rent Acts may be said to order these things better. In *Benninga (Mitcham)* v. *Bijstra* [1946] 1 K.B. 58 (C.A.), the plaintiff landlords of a controlled house gave the defendant, its tenant, notice to quit in February, 1945. On 20th March they issued a plaint claiming possession. On 16th April an employee started work with them. The action was heard on 2nd May and they satisfied the judge, *inter alia*, that the dwelling-house was reasonably required by them as a residence for some person engaged in their whole-time employment (Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I, para. (*g*)), namely, the new employee. It was contended that the cause of action had not been complete when the plaint was issued on 20th March. Mackinnon, L.J.'s judgment illustrated the true position in these terms : " The plaintiffs' cause of action is a claim to the possession of their freehold against a tenant who has received due notice to quit. That cause of action existed on 20th March. The Rent Restrictions Acts do not forbid the bringing of an action ; they only prohibit the granting of certain relief, to which the common law would entitle the plaintiff, unless certain conditions have been fulfilled. The question whether those conditions exist must be determined when the question whether the relief claimed may be granted has to be decided, namely, at the hearing of the action."

The decision warrants the proposition that a landlord of controlled premises, once the contractual tenancy has been determined, can bring an action and rely on many of the " grounds for possession " at the hearing, though they did not exist when he issued proceedings, e.g., on the unexpected availability of suitable alternative accommodation.

But the landlord of business premises opposing an application on the ground of a s. 30 (1) (*f*) or (*g*) intention has, owing to the phraseology of the Act as interpreted in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.*, to prove not only the existence of that intention at the date of the hearing but also that he predicted its existence when giving notice to terminate under s. 25 or notifying opposition under s. 26. It may be that the landlords in *Nursey* v. *P. Currie (Dartford), Ltd.*, got a bit of a shock when the local planning committee granted their revised application, but they ought not to have been so astonished, or to have been so diffident when serving notice to terminate, and have less claim to sympathy accordingly. The law relating to fortune-telling being what it is, however, and as it was described at 102 Sol. J. 264, it would not have been right for them to consult a clairvoyante who might, or might not, have seen a row of petrol pumps and a car park in her crystal.

R. B.

Wills and Bequests

Mr. William Henry Bellamy, retired solicitor, of Redhill, left £87,409 net.

Mr. Gerald Samuel Hampton, solicitor, of Reading, left £48,775 net.

Mr. T. W. Howland, solicitor, of Berkhampstead, left £40,196 net.

Mr. John Oscar Ince, retired solicitor, of Burgess Hill, left £49,307 net.

HERE AND THERE

LUNCHING WITH A COMPUTER

I HAVE just had luncheon with an electronic computer; at any rate the electronic computer was the essential host at the function. Electronic computers have the same voracious appetites that elephants have for hay; they are fed incessantly with data and instructions. Having witnessed the spectacle and wished the creature a good appetite, we, its guests, retired to our less esoteric and ascetic repast. To speak of an "electronic brain" is actually a journalistic vulgarism, suitable for ironical application to some human beings, but for no other purpose. The thing in fact is a moron; it has a digestion but no mind. The orthodox description of its function is "data processing." It has an "input" which receives the data translated into machine language. It has a working memory which remembers its instructions. It has an arithmetical and logical unit which does the processing. It has an "output" of the processed data which can, if so desired, be printed straight off, translated back into human language. By a system of disc storage it can make any given fact directly available without a hunt through irrelevant matters. Finally, at the heart of it all, there is the overall control section which gives the thing its instructions. These must be very detailed, very precise and broken down step by step, because the thing, having no intelligence of its own, can only obey literally; but, properly instructed, it can cope with a series of "ifs" and "ands" and "buts," and to that extent can make a sequence of logical decisions. If so instructed, it can signal in machine language "Hey! here's a mistake" and stop, or else it can note the presence of a mistake and go straight on. There is nothing very sinister about its appearance. Different parts of it look like a telephone switchboard with winking lights, a filing cabinet, a metal office desk and a weighing machine. To mere flesh and blood it seems to generate a somewhat oppressive atmosphere around it, perhaps a matter of high temperature, perhaps because of all those electronic impulses frantically at work.

WHAT OF RESPONSIBILITY?

IF fifty clerks with fifty quills scribbled for half a year they would scarcely get through one smooth day's work of one of these monsters, which, incidentally, with their infinite but moronic capacity for taking pains, reduce to absurdity the least thoughtful of all the definitions of "genius." The results achieved by this machine are at first sight startling, but no ego in good condition (that is, with a proper ballast of humility) need be put out by them. I cannot swim like a fish or climb like a monkey or uproot trees with my nose like an elephant, but that doesn't in the least abash me. Nor does it abash me to know that a well instructed machine can make lightning classifications of data which I would never attempt and would have no use for if I did. However, what is more disturbing is the possible effect on human responsibility of this latest stage in a process which has been steadily tending to de-humanise the work of the world. Admittedly it required a very high order of intelligence (of a certain sort) to develop these machines, but their operation (which can be very boring) requires (we are told) aptitude rather than education, and an operator can qualify in a month. One would not describe as literate a community in which a very few persons had read their way through the bulk of the British Museum Library, while no one else could or need get beyond looking at the pictures in "The Daily Flash." This diminution of human responsibility, if it became widespread, would have both legal and moral repercussions. One of the guests at the luncheon suggested an analogy with the diminished standard of care in hospitals since remote hospital boards assumed the liability for damages for negligence which formerly rested squarely on the shoulders of the individuals concerned.

VARIED POSSIBILITIES

THE rôle of the electronic computer is rich in legal possibilities and legal problems. Already in the United States some large concerns send in their tax returns to the Central Office of Revenue on reels of computer tape. It is, of course, a convenient way of storing accounts. Would the English courts hold that such records complied with the requirement to keep proper books of account? Suppose the accuracy of information so recorded is disputed, how can it be proved in a court of law? The machine (we are told) will itself detect nonsense, but suppose it is manipulated to make fraudulent sense? Has it a future in drafting leases and conveyances? There was once a very distinguished conveyancer in Lincoln's Inn who kept an enormous stock of prefabricated clauses so that his drafts were a highly skilful mosaic. Something of the sort should not be beyond the range of the computer, so long as the parties are not obstinately bent on demanding tailor-made subtleties to fit their individual idiosyncracies as they might demand hand-made shoes. But for the landlords of enormous great blocks of flats or offices or of housing estates with a whip-hand over all their tenants, why, it might well work. Again, all machines sometimes slip. Automatic telephones can give you wrong numbers. Suppose in a banking account or a pay roll the machine turned £10 into £10,000, how would one allocate responsibility? Even the law of libel is not excluded since in the case of accounts computed, printed, folded, addressed and dropped in the post-bag, a malicious employee might instruct the machine to write on each sheet: "The chief accountant is a so and so." Or, turning to higher things, how would you like to be sentenced by electronic computer? A punch-card might record a set of standard factors in assessing penalties and the result could be produced in a flash. The same system might be applied in the assessment of damages for personal injuries.

COMPUTER'S DELIGHT

IT is a pity that the old Chancery practice of interrogatories (which was in effect cross-examination in writing) is no more, for it was a job eminently suited to the talents of the electronic computer. The key document was then the "bill in Chancery", and every allegation in it was turned into a searching question, thus: "Is it not a fact that the defendant Blank, either with or without the cognizance of the defendant Blott, at Chaldon, in the County of Dorset, or at some other and which place, offered to sell property known as Jericho or some other and what property to the plaintiff for the sum of £1,000 or some other and what sum and if not why not or how otherwise?" Now, surely that job, which was usually delegated by counsel to their clerks, would have been a magnificent exercise for advanced computers. There was once a case arising out of a breach of trust in which a trustee had let himself be overborne by the supplications of a married woman; the interrogatories came out like this: "Did not the defendant fall down on her knees or on one or which of them and implore the plaintiff with tears in her eyes or in one and which of them to advance

the said sum to her husband to save him from bankruptcy and their children from ruin and if not why not or how otherwise ?" Once to test his clerk's reactions a barrister quietly interpolated a chunk of "Paradise Lost" into a draft bill in Chancery. With a fidelity worthy of the best electronic computer back came the result : "Was it man's first or some other and what disobedience and the fruit of that forbidden or some other and what tree, whose mortal taste brought death into this or some other and what world and all our woe, and if not why not or how otherwise ?"

RICHARD ROE.

"THE SOLICITORS' JOURNAL," 9th APRIL, 1859

AN article in THE SOLICITORS' JOURNAL of the 9th April, 1859, criticised the system of professional remuneration : "For every species of professional business in which an attorney can be employed, the charges are fixed by authority. The attorney is strictly prohibited from charging at a higher rate than the tariff prescribes . . . Except in a very few cases, no regard is had in fixing an attorney's bill to the difficulty of the work to be performed or to the responsibility he has incurred. The skill acquired by years of practice, the saving of trouble and expense by prudent negotiation, and the extent of benefit which the client may have received, are all valued by a mere mechanical standard rigidly applied. It is perhaps not saying too much, that under such a system the best services are the worst paid for . . . The charges apply to each step of the work performed. Every kind of business is divided by a minute process into its component parts, and each of these is separately charged for . . . In general it may be said that the higher labour is charged for too low, and the mechanical labour and materials too high. To increase the evil still further, written documents are paid for . . . according to their length. The profits of an attorney are thus in great measure made to depend, not on his ability and energy, his knowledge of the law, and his skill in managing the business of his clients, but on the inferior part of his labours, on the number of steps he can introduce into any proceeding, and on the length to which he can spin out the documents which he prepares. Now the natural result of such a system is that, as legal practitioners must obtain something like proper remuneration for their services, they are compelled, in cases where the scales do not afford sufficient recompense for the real and necessary work, to charge the highest rate which the scales permit for work that is merely formal and mechanical, and come to do a great deal of work which is unnecessary. . . ."

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Adoption—ILLEGITIMATE CHILD—FATHER'S LIABILITY

Q. We are instructed to apply for an adoption order by the mother of an illegitimate infant aged ten years. The father of the infant has been making a voluntary weekly contribution for his maintenance. When the order is made by the county court will the order affect the legal liability of the father for the child's maintenance ?

A. If the father has undertaken by agreement to make payments specifically for the infant's benefit, then, whether the adoption order is made under the Adoption Act, 1950, or under the Adoption Act, 1958 (which came into force on 1st April, 1959) the agreement will continue in force notwithstanding the adoption by the mother, *provided* she is a single woman (which probably means the same in this context as in bastardy law). Her marriage after 31st March, 1959, will not affect the position either (see Children Act, 1958, s. 22 (4), repealed but given effect by the Adoption Act, 1958).

But presumably the word "voluntary" in the question is intended to indicate that the weekly contributions are not made in pursuance of any such agreement. Section 15 (2) of the Adoption Act, 1958, is in point here. It provides that after an adoption order relating to an illegitimate infant has been made *under the new Act*, i.e., on or after 1st April, 1959, no affiliation order shall be made with respect to the infant unless the adoption order was made on the application of the mother alone. The plain inference is (*a*) that a single woman who has adopted *alone* her own illegitimate infant can apply for an affiliation order ; (*b*) that that is so under the former law, for the subsection is cutting down a right, not creating it ; and (*c*) that the father's legal liability for the child's maintenance is not affected by adoption unless the adoption order is in favour of some applicant other than the mother alone.

Charity—BEQUEST OF CAPITAL SUM WITH DIRECTION TO APPLY INCOME "FOR CHARITABLE PURPOSES"

Q. By his will, a testator gave two separate sums of money to a particular rotary club and a particular lodge of freemasons, respectively. In each case the will directed that the recipients were to hold the capital sum "in perpetuity" and to apply the income "for charitable purposes." (*a*) Are the gifts valid ? (*b*) If so, are the beneficiaries permitted to apply the capital as well as the income "for charitable purposes" ? (*c*) If the answer to the last question is in the negative, what would happen to the capital sums in the event of the beneficiaries failing to carry out the testator's direction in respect of income, or in the event of either the particular rotary club or the particular lodge of freemasons ceasing to exist ?

A. (*a*) The gifts are valid because they are exclusively charitable. (*b*) and (*c*) Since a scheme ought to be settled, the application of both the capital and income will be dealt with therein. Any failure to carry out the terms of the scheme will be dealt with in the manner usual where charitable trustees are guilty of default or neglect. See, generally, the section on Charities in Halsbury, 3rd ed., vol. 4, p. 206 *et seq.*

Demolition Order—HOUSE FOR DEMOLITION AFFORDING SUPPORT TO ADJOINING PROPERTY

Q. Our client owns the end house but one of a terrace of some six or more houses. The end house has become unsafe and unfit for human habitation owing to scouring by a brook nearby. The local authority have made a demolition order on this end house which has been duly served and has not been objected to, but neither the owner nor the mortgagee of the end house have made any move to comply therewith. The local authority propose to proceed to demolish. Our client informs us that the party wall between his house and the end house is only one brick thick, and that this wall is not built up to the roof. He can in fact walk along the ceiling joists of each of the adjoining houses. When the end house is pulled down the gable end of our client's house will be exposed to the elements and his house will become uninhabitable. The local authority have admitted liability to support the party wall but will not admit any liability to make the wall good either in thickness or in height. What is our client's position, and is he liable to bear the full cost of making his house habitable ? The local authority are proceeding under a statutory power and accordingly, we submit, are liable to make good damage caused to third parties by the exercise of that power.

A. It is clear that, if the demolished house was affording support to the adjoining property in such circumstances that

an easement of support would have been acquired, the local authority are in the shoes of the former owner and must restore that support (*Bond* v. *Norman ; Bond* v. *Nottingham Corporation* [1940] 2 All E.R.12). There is, however, no such right known to English law as an " easement of waterproofing " ; a dominant owner cannot as a matter of general principle acquire a right as against the servient owner to require him to take some positive remedial action. There has been no decided case directly on the point, although *Thompson* v. *Hill* (1870), L.R. 5 C.P. 564, tends to support the view expressed. In our opinion, therefore, the local authority can at most be required to provide support to the premises left standing.

Stamp Duty—Separate Sale of Shop and Goodwill—Whether One Transaction

Q. *A* is the owner of a shop and carries on a business at that shop in partnership with *B*. *A* has agreed to sell the shop to *C*. Messrs. *A* and *B* have by separate contract agreed to sell the goodwill of the business to *C*. It is proposed to transfer the shop by conveyance between *A* and *C*. The goodwill is to be assigned by Messrs. *A* and *B* to *C* by a separate document. Can the appropriate certificate for value be inserted in each document, or is the matter to be considered one transaction for stamp duty purposes ?

A. This is always a difficult question and it is one upon which there is no very useful authority. In the case of transactions between the same vendor and the same purchaser we consider it a useful test to inquire whether the parties would have gone on with one transaction without the other : or sometimes more accurately, whether the vendor would have sold the one property without also selling the other. Had *A* been the sole owner of shop and goodwill we should have concluded, on this test, that there was but one transaction. Here, however, there is the added complication that *B* is a party to the sale of the goodwill and has no interest in the shop. If one has regard for the basic reason for the certificate—to prevent bargains being split into parts to economise in stamp duty—it could be given here because there is no artificial split. Having regard to the fact that *B* is a party to one but not the other transaction, we think that the certificate might properly be included leaving the Revenue authorities to challenge it if they are so inclined.

One of Two Remaindermen Predeceasing Tenant for Life

Q. We are acting in connection with the estate of a testator whose " home-made " will included a gift of his leasehold house to his wife *A* " for her benefit during her lifetime and at her death to be equally divided between my son *B* and my daughter *C*." The testator died about thirteen years ago. The tenant for life *A* died recently and is survived by the daughter *C*. The son *B* died after the death of the testator but before the death of the tenant for life, and is survived by a widow and child. Is *C* now solely entitled to the property or does she take a half-share only, and if so, what is the devolution of the other half-share, i.e., is there an intestacy, or does it pass to *B's* estate or to his child ?

A. The general principle of law is this : an estate or interest is vested in interest when the only reason for its not being immediately vested in possession is because some other person is entitled to a life interest in the particular estate or interest. This general principle is, of course, subject to any contrary intention expressed in the will. See, e.g., Halsbury, 2nd ed., vol. 34, p. 369 *et seq*. Here, there is nothing in the will to displace the general principle. Therefore, *B* and *C* both acquired vested interests by surviving the testator. Hence, the half-share of *B* formed part of his estate.

Rent Act, 1957—Notice of Increase Served—Effect of Reduction in Rateable Value on Rent Limit

Q. A self-contained flat is let on a weekly controlled tenancy. The rent is inclusive of outgoings and the tenant is responsible for interior repairs. A notice of increase of rent was served on the coming into operation of the Rent Act, 1957, so that the rent limit is twice the 1956 gross value plus outgoings. The local authority have indicated that they will accept a proposal to reduce the assessment on account of dampness, it being a basement flat. If the assessment is so reduced, does the rent limit remain at twice the 1956 gross value or does it become twice the reduced gross value ? If the latter, there would appear to be no advantage accruing to the landlord in making the proposal and only the tenant would benefit.

A. The contemplated reduction in rateable value would not, in our opinion, affect the rent limit as determined by the Rent Act, 1957, s. 1 (1) and Sched. I, Pt. I, at twice the 1956 gross value (defined in s. 25 (1)) adjusted, by reference to outgoings, in accordance with the provision of s. 1 (2) and s. 3. The definition : " . . . subject to the provisions of the Fifth Schedule to this Act, the gross value thereof as shown in the valuation list on the seventh day of November, nineteen hundred and fifty-six " is, we consider, conclusive of the matter, Sched. V providing for reduction only in certain cases in which a proposal was made before 1st April, 1957.

Costs of New Lease of Business Premises

Q. A landlord of certain business premises is negotiating with the present lessee for the grant to him of a new lease of the premises and does not wish to grant the lease on any better terms than the lessee could obtain by applying to the court under Pt. II of the Landlord and Tenant Act, 1954. The question arises as to whether, having regard to the Costs of Leases Act, 1958, and if a lease were granted by order of court under the 1954 Act, the lessee could be compelled to pay the costs of the lease in the absence of an agreement in writing between the parties for him to do so. The 1954 Act omits any reference to the question of payment of the costs of a lease and no doubt it was assumed that these would be dealt with in the then customary manner. Moreover, we doubt whether the court has power under s. 35 to make any order as to payment of these costs, as that section merely refers to the " terms of a tenancy." We shall appreciate your views.

A. In our opinion, the Costs of Leases Act, 1958, would govern the situation visualised, it being open to the lessor to invite the court to include, among the terms covered by the Landlord and Tenant Act, 1954, s. 35, provision for payment of costs by the lessee. We would not consider that the fact that the Costs of Leases Act was not in force at the time would be a " relevant circumstance " within the meaning of the section and would point out that what the Act essentially did was to dispose of the *Grissell* v. *Robinson* (1836), 3 Bing. N.C. 5, assumption of lessee's implied assent to employment of lessor's solicitor. Thus, it was always possible, before 23rd July, 1958, for a lessee to stipulate that he should not be liable for the costs or for all of them—and for a court to include such stipulation among the terms of a new tenancy granted by order under the Landlord and Tenant Act, 1954, Pt. II.

Destruction of Fingerprints

Q. I act for a successful appellant to quarter sessions against his conviction for theft in the magistrates' court. The appellant has a clean record and as his fingerprints were taken by the police when he was originally charged he wishes to apply to the magistrates' court for an order or direction to be made by the Bench for the destruction of his fingerprints. Is it not within the competence of the Bench to make such an order ?

A. It is not stated whether the fingerprints were taken by order of the Home Secretary under the Regulations for the Measuring and Photographing of Criminal Prisoners, 1896, or by order of a magistrates' court under the Magistrates' Court Act, 1952, s. 40, or whether the person concerned gave them voluntarily to the police. If the prints were taken by order under the cited Regulations of 1896 or under s. 40, the police must now destroy them as the Regulations and s. 40 (4) respec tively require. The magistrates have no power to order the destruction of the prints whether they were taken under the Regulations, s. 40 or otherwise. The police should be asked, we suggest, to destroy them. If the police refuse to do so and the prints were taken by an order under s. 40 or the Regulations, the Home Office should be approached and they will no doubt see that destruction is effected. If, however, the prints were taken voluntarily and without an order, the police are not, so far as we are aware, under any duty to destroy them. No doubt a courteous request could be made for their destruction and, if this is refused, the Home Office or the local M.P. could be approached. We know of no power to compel the destruction of prints taken voluntarily.

REVIEWS

Criminal Case and Comment, 1958. Edited by J. C. SMITH, M.A., LL.B., Barrister-at-Law. pp. x and (with index) 163. 1959. London: Sweet & Maxwell, Ltd. 17s. 6d. net.

This volume is a very useful one as it contains short reports of many important decisions, together with a helpful commentary on each case. It seems that most, if not all, of the reports first appeared in the monthly issues of the *Criminal Law Review* and for this reason this work may prove to be of less value to subscribers to that journal to whom it is available at 12s. 6d.

The cases reported are not only decisions of the higher courts of criminal jurisdiction, but the work also contains notes of decisions of quarter sessions and magistrates' courts. Of course, many of the decisions of the higher courts have now been fully reported and this reveals the inadequacy of the abbreviated reports. For example, in *R.* v. *Jones* [1959] 2 W.L.R. 190, the Court of Criminal Appeal approved and applied the finding of Lord Sorn in *H.M. Advocate* v. *Graham* [1958] S.L.T. 167, to the effect that "if a burglar is interrupted and if he murders in order to get away, it is still murder done in the course of theft." These words, or this view, are not recorded in the report of *H.M. Advocate* v. *Graham, supra*, in the volume under review.

However, criticism of this kind must not be allowed to detract from the value of this work which is completed by a list of contents, tables of cases, statutes, Commonwealth ordinances and statutory instruments and an index. The practitioner will find it a useful guide to decisions in the field of criminal law in 1958.

The Child and the Court. By W. E. CAVENAGH. With a Foreword by T. A. HAMILTON BAYNES, J.P. pp. 239. 1959. London: Victor Gollancz, Ltd. £1 1s. net.

Children and the Law. By F. T. GILES. With a Foreword by the Rt. Hon. LORD GODDARD, P.C. pp. (with Index) 157. 1959. London: Penguin Books, Ltd. 3s. 6d. net.

If any evidence were needed of the increasing social consciousness upon questions of child welfare it is provided by the publication of these two books by well-known publishers at popular prices. A deep and sympathetic understanding of the juvenile mind is shown by Mrs. Cavenagh, a lecturer in Social Study at Birmingham University and herself a magistrate. "Children very early become aware that there are a large number of acts and situations which are not approved of by adults. Only a minority of these are, however, against the law. There are a number of other things, e.g., playing with old railway sleepers in railway premises, which are against the law, though only policemen and a few other people disapprove of them. One therefore does not necessarily disapprove of these latter things oneself, but it wouldn't be common sense to do them if there was a policeman standing at one's elbow . . . When a policeman is coming it is better to stop whatever one is doing and do something else—or better still, do nothing. Curiously enough this latter course isn't too clever always either, as it makes them ask questions about what one has been up to lately, and it's pretty likely something or other will turn out to have been wrong, or if it doesn't one begins to feel as if it had been" (pp. 133/4).

After describing the magistrates' court in general terms Mrs. Cavenagh paints a clear picture of the workings of the juvenile court which is, of course, also a court of summary jurisdiction although modifications in procedure are made and members of the public as such are not permitted to attend their hearings.

In respect of offenders requiring detention the author makes a plea for providing separate accommodation for the hardened and the less hardened (p. 105). The revelations (at p. 138 *et seq.*) concerning police supervision of persons not convicted of any offences are disturbing and should attract the attention of M.P.'s and others actively concerned with the liberty of the subject. Criticism is rightly made of the fact that in order to obtain suitable education for some children they must first be convicted as criminals (p. 186).

The inclusion of a full index and a select bibliography at the end of the book would be an improvement. For the sake of subsequent editions—of which we feel this book is assured—we note the minor errors of "some" for "soon" on p. 29 and "stain" for "strain" on p. 38.

Much the same ground is covered by Mr. Giles in his book although here are to be found many more quotations from the relevant statutes. The author has great experience of his subject-matter having been at one time Chief Clerk of the London Juvenile Courts; at present he is Chief Clerk of the Clerkenwell Magistrates' Court. His illustrations from actual cases are both readable and enlightening. Implicit in his warnings about psychology and psychiatry is the point also made by Mrs. Cavenagh that specialists who supply courts with reports are neither experts on penology nor are they charged with protecting the public against crime. It is refreshing to read such a clear exposition of his subject-matter interspersed with so much of the author's obvious large endowment of common sense.

Can I Help You? By DUDLEY PERKINS, M.A., solicitor. pp. vii and (with Index) 264. 1959. London: Cassell & Co., Ltd. 16s. net.

The publication of this book follows an unusually successful series of broadcasts by the author for laymen on legal subjects. The range of subjects covered is impressive varying from the Rent Acts to missing persons, from changing names to making a will. There is no doubt that at the very modest price of 16s. for its 264 well-informed pages this book will become a best-seller. The oft-reiterated advice it contains to consult a solicitor together with the recent implementation of the legal advice provisions of the Legal Aid and Advice Act, 1949, may increase solicitor-mindedness on the part of the public, too many of whom appear to be unduly nervous of seeking professional legal advice.

Is this publication of interest to solicitors? It can be confidently recommended to make interesting reading and will act as an elementary refresher course on any particular topic with which a practitioner has not recently been concerned. All articled clerks should certainly read it as a break from their heavier prescribed reading. Many points which such works take some pages to make are succinctly explained by the author in as many lines. The appendix of authorities and index will be especially appreciated by lawyers and law students.

Official Architecture and Planning Year Book, 1959. Edited by Robert McKown. pp. 202. 1959. London: Chantry Publications, Ltd. 15s. net.

This is a useful work facilitating quick reference to the identity of executive officers responsible for architectural and town planning matters in government departments, local authorities, statutory undertakings, and private firms. It gives not only the names of the chief officers responsible for this work but, in appropriate cases, those of their deputies and senior assistants also. The appendices give the names and addresses of London County Council district surveyors and alphabetical lists of county boroughs in England and Wales and large burghs in Scotland.

Hotels and Restaurants throughout the British Isles and Northern Ireland. Thirty-first Edition. pp. xvi and 519. 1959. London: British Hotels and Restaurants Association. 3s. 6d. net.

Particulars of hotels and licensed restaurants in Great Britain, Ireland, and certain Commonwealth countries are contained in this official guide of the British Hotels and Restaurants Association. Its main section contains an illustration of each establishment, with details of its size, situation, amenities, and tariffs. Also included are useful road and rail maps, mileage tables, main-route diagrams showing distances, and details of ferry services.

At the Annual general meeting of the BLACKBURN INCORPORATED LAW ASSOCIATION held on 12th March, 1959, Mr. L. Ranson, LL.B., J.P., was elected president in succession to Mr. G. Wightman, and Mr. W. E. S. Weeks was elected vice-president. Mr. A. Carter and Mr. J. W. Hollows were re-elected hon. treasurer and hon. secretary, respectively.

BOOKS RECEIVED

Contempt of Court. A report by *Justice*. Chairman: The Rt. Hon. LORD SHAWCROSS, P.C., Q.C. pp. v and 42. 1959. London: Stevens & Sons, Ltd. 5s. net.

Investing Simplified. By EDWARD DU CANN, M.P. With a Foreword by Sir EDWARD WILSHAW, K.C.M.G., D.L., J.P., LL.D., F.C.I.S. pp. x and 154. 1959. London: Newman Neame, Ltd. 15s. net.

Notes on Matrimonial Causes Proceeding in District Registries. Fifth Edition. By THOMAS STANWORTH HUMPHREYS. pp. vi and (with Index) 82. 1959. London: The Solicitors' Law Stationery Society, Ltd. 8s. 6d. net.

Sweet & Maxwell's Guide to Law Reports and Statutes. Third Edition. pp. 117. 1959. London: Sweet & Maxwell, Ltd. Edinburgh: W. Green & Son, Ltd. £1 1s. net.

Oyez Practice Notes No. 42: Applications under s. 17 of the Married Women's Property Act, 1882. By J. H. HAMES, M.A., LL.B., of the Inner Temple, Barrister-at-Law. pp. 52. 1959. London: The Solicitors' Law Stationery Society, Ltd. 8s. 6d. net.

Jackson and Muir Watt: Agricultural Holdings. Eleventh Edition. By J. MUIR WATT, M.A., of the Inner Temple, Barrister-at-Law. With a Manual of Tenant Right Valuation by D. H. CHAPMAN, A.R.I.C.S., Q.A.L.A.S. pp. xl and (with Index) 570. 1959. London: Sweet & Maxwell, Ltd. £2 15s. net.

Dynamic Accounting. By EUGEN SCHMALENBACH. Translated from the German by G. W. MURPHY, B.A. (Com.), F.C.A., J.P., and KENNETH S. MOST, LL.B., A.C.A. pp. 222. 1959. London: Gee & Co. (Publishers), Ltd. £2 2s. net.

British Legal Papers presented to the Fifth International Congress on Comparative Law, Palace of Justice, Brussels, 4th–9th August, 1958. General Editor, Dr. A. K. R. KIRALFY. pp. ix and 389. 1959. Distributed by Stevens & Sons, Ltd., London. Sole North American Distributors: Oceana Publications Inc., New York City. £3 3s. net.

The Law and Custom of the Sea. Third Edition. By H. A. SMITH, D.C.L. (Oxon). pp. xiv and (with Index) 291. Published under the auspices of The London Institute of World Affairs. 1959. London: Stevens & Sons, Ltd. £1 1s. net.

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Abolition of the Education (Scotland) Fund (Consequential Provisions) Regulations, 1959. (S.I. 1959 No. 476.) 8d.

Adoption (County Court) Rules, 1959. (S.I. 1959 No. 480.) 1s.

Adoption (High Court) Rules, 1959. (S.I. 1959 No. 479.) 11d.

Adoption (Juvenile Court) Rules, 1959. (S.I. 1959 No. 504.) 1s.

Approved Schools (Contributions by Local Authorities) Regulations, 1959. (S.I. 1959 No. 548.) 5d.

Ashby de la Zouch Rural District (New Streets) Order, 1959. (S.I. 1959 No. 505.) 4d.

Birth Certificate (Shortened Form) Regulations, 1959. (S.I. 1959 No. 529.) 5d.

Bristol Waterworks (Glastonbury) Order, 1959. (S.I. 1959 No. 468.) 9d.

British Commonwealth and Foreign Parcel Post Amendment (No. 1) Warrant, 1959. (S.I. 1959 No. 499.) 6d.

British Commonwealth and Foreign Post Warrant, 1959. (S.I. 1959 No. 498.) 1s. 8d.

British Postal Agencies (Commonwealth and Foreign Parcel Post) Amendment (No. 1) Warrant, 1959. (S.I. 1959 No. 502.) 5d.

British Postal Agencies (Commonwealth and Foreign Post) Warrant, 1959. (S.I. 1959 No. 501.) 11d.

British Transport Commission (Payments for Rating Authorities) Regulations, 1959. (S.I. 1959 No. 526.) 5d.

Central Land Board (Dissolution and Transfer of Functions) Order, 1959. (S.I. 1959 No. 530.) 5d.

East Devon Water (Cotley) Order, 1959. (S.I. 1959 No. 506.) 8d.

Exchange Control (Import and Export) (Amendment) Order, 1959. (S.I. 1959 No. 517.) 4d.

Food Standards (Ice-Cream) Regulations, 1959. (S.I. 1959 No. 472.) 5d.

Foreign Marriage (Amendment) Order, 1959. (S.I. 1959 No. 538.) 4d.

Foreign Service Fees Order, 1959. (S.I. 1959 No. 537.) 8d.

Further Education (Scotland) Regulations, 1959. (S.I. 1959 No. 477.) 7d.

Gas (Meter) (Amendment) Regulations, 1959. (S.I. 1959 No. 503.) 5d.

Import Duties (General) (No. 4) Order, 1959. (S.I. 1959 No. 520.) 5d.

Import Duties (Temporary Exemptions) (No. 3) Order, 1959. (S.I. 1959 No. 521.) 5d.

Import Duties (Temporary Exemptions) (No. 4) Order, 1959. (S.I. 1959 No. 522.) 5d.

Inland Post Amendment (No. 4) Warrant, 1959. (S.I. 1959 No. 500.) 7d.

Ironstone Restoration Fund (Contributions) (Rate of Interest) Order, 1959. (S.I. 1959 No. 547.) 5d.

Labelling of Food (Amendment) Regulations, 1959. (S.I. 1959 No. 471.) 5d.

London Traffic (Chertsey) Regulations, 1959. (S.I. 1959 No. 515.) 5d.

London Traffic (Prescribed Routes) (St. Marylebone) Regulations, 1959. (S.I. 1959 No. 516.) 4d.

Manchester Water (No. 2) Order, 1959. (S.I. 1959 No. 492.) 4d.

Meat (Staining and Sterilization) (Revocation) Regulations, 1959. (S.I. 1959 No. 473.) 4d.

Minehead Water Order, 1959. (S.I. 1959 No. 493.) 5d.

National Health Service (Designation of London Teaching Hospitals) Amendment (No. 1) Order, 1959. (S.I. 1959 No. 518.) 5d.

National Health Service (Wessex Regional Hospital Board) Order, 1959. (S.I. 1959 No. 497.) 5d.

National Insurance (Earnings) Regulations, 1959. (S.I. 1959 No. 549.) 5d.

National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1959. (S.I. 1959 No. 467.) 1s. 5d.

Opencast Coal (Registration of Orders) Rules, 1959. (S.I. 1959 No. 481.) 6d.

Patents (Amending) Rules, 1959. (S.I. 1959 No. 524.) 4d.

Rate-Deficiency Grants Regulations, 1959. (S.I. 1959 No. 525.) 6d.

Registration (Births, Stillbirths, Deaths and Marriages) Amendment Regulations, 1959. (S.I. 1959 No. 528.) 5d.

River Dove Water Board Order, 1959. (S.I. 1959 No. 519.) 5d.

Sheringham Water Order, 1959. (S.I. 1959 No. 494.) 5d.

Small Farmer (England and Wales and Northern Ireland) Scheme, 1959. (S.I. 1959 No. 474.) 7d.

Small Farmer (England and Wales and Northern Ireland) Supplementary Scheme, 1959. (S.I. 1959 No. 475.) 7d.

Special Constables (Pensions) Order, 1959. (S.I. 1959 No. 531.) 5d.

Stockport Water Order, 1959. (S.I. 1959 No. 469.) 5d.

Stopping up of Highways (County of Buckingham) (No. 4) Order, 1959. (S.I. 1959 No. 484.) 5d.

Stopping up of Highways (County of Chester) (No. 4) Order, 1959. (S.I. 1959 No. 485.) 5d.

Stopping up of Highways (County of Chester) (No. 5) Order, 1959. (S.I. 1959 No. 486.) 5d.

Stopping up of Highways (City and County Borough of Coventry) (No. 2) Order, 1959. (S.I. 1959 No. 508.) 5d.

Stopping up of Highways (City and County Borough of Coventry) (No. 4) Order, 1959. (S.I. 1959 No. 487.) 5d.

Stopping up of Highways (County of Devon) (No. 2) Order, 1959. (S.I. 1959 No. 513.) 5d.

Stopping up of Highways (County of Dorset) (No. 2) Order, 1959. (S.I. 1959 No. 488.) 5d.

Stopping up of Highways (County of Durham) (No. 3) Order, 1959. (S.I. 1959 No. 491.) 5d.

Stopping up of Highways (County of Gloucester) (No. 6) Order, 1959. (S.I. 1959 No. 509.) 5d.

Stopping up of Highways (County of Gloucester) (No. 7) Order, 1959. (S.I. 1959 No. 510.) 5d.

Stopping up of Highways (County of Gloucester) (No. 8) Order, 1959. (S.I. 1959 No. 514.) 5d.

Stopping up of Highways (County of Kent) (No. 7) Order, 1959. (S.I. 1959 No. 490.) 5d.

Stopping up of Highways (City and County of Kingston upon Hull) (No. 2) Order, 1959. (S.I. 1959 No. 541.) 5d.

Stopping up of Highways (Lancashire) (No. 3) Order, 1957 (Amendment) Order, 1959. (S.I. 1959 No. 545.) 5d.

Stopping up of Highways (County of Lancaster) (No. 5) Order, 1959. (S.I. 1959 No. 542.) 5d.

Stopping up of Highways (County Borough of Northampton) (No. 2) Order, 1959. (S.I. 1959 No. 543.) 5d.

Stopping up of Highways (County of Somerset) (No. 4) Order, 1959. (S.I. 1959 No. 511.) 5d.

Stopping up of Highways (County of Stafford) (No. 3) Order, 1959. (S.I. 1959 No. 461.) 5d.

Stopping up of Highways (County of Worcester) (No. 1) Order, 1959. (S.I. 1959 No. 512.) 5d.

Stopping up of Highways (North Riding of Yorkshire) (No. 4) Order, 1953 (Revocation) Order, 1959. (S.I. 1959 No. 544.) 4d.

Swindon (Water Charges) Order, 1959. (S.I. 1959 No. 578.) 5d.

Sugar Beet (Research and Education) Order, 1959. (S.I. 1959 No. 550.) 5d.

Treasury (Loans to Local Authorities) (Interest) Minute, 1959. (S.I. 1959 No. 574.) 5d.

West Cheshire Water Board (Charges) Order, 1959. (S.I. 1959 No. 565.) 5d.

Widmerpool-Nottingham-Bawtry Goole-Howden Trunk Road (Boothfery Bridge, Northern Approach Diversion) Order, 1959. (S.I. 1959 No. 489.) 5d.

SELECTED APPOINTED DAYS

April

1st
- Adoption Act, 1958.
- Adoption (County Court) Rules, 1959. (S.I. 1959 No. 480.)
- Adoption (High Court) Rules, 1959. (S.I. 1959 No. 479.)
- Adoption (Juvenile Court) Rules, 1959. (S.I. 1959 No. 504.)
- Children Act, 1958.
- Drainage Rates Act, 1958.
- Local Government Act, 1958, ss. 9 to 14, 57, 58 and Sched. IX.
- Registration of Births, Deaths and Marriages (Special Provisions) Act, 1957.
- Rules of the Supreme Court (No. 1), 1959. (S.I. 1959 No. 450.)
- Tribunals and Inquiries Act, 1958, ss. 8, 9 and 12.
- Tribunals and Inquiries (Revenue Tribunals) Order, 1959. (S.I. 1959 No. 452.)

6th
- Opencast Coal (Registration of Orders) Rules, 1959. (S.I. 1959 No. 481.)

27th
- Food Standards (Ice-Cream) Regulations, 1959. (S.I. 1959 No. 472.)
- Labelling of Food (Amendment) Regulations, 1959. (S.I. 1959 No. 471.)

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Life Policies and Estate Duty

Sir,—In case the article entitled "Life Policies and Estate Duty" in your issue of 27th March last [p. 245, *ante*] should have given an erroneous impression, I think it should be known that in a case where the chief examiner of the Estate Duty Office claimed, in reliance upon *Potter* v. *Inland Revenue Commissioners* [1958] T.R. 55, and in particular the judgment of Lord Mackintosh, that several nominated life policies taken out by a deceased within five years of his death were dutiable as gifts *inter vivos* under s. 2 (1) (*c*) of the Finance Act, 1894, and consequently aggregable, argument was addressed to him, *inter alia*, as to the dissimilarity of the facts, and also as to the observations of Lord Mackintosh himself in *Potter's* case upon the wording of s. 2 (1) (*c*) (incorporating s. 38 (2) (*a*) of the Customs and Inland Revenue Act, 1881), and citing *Sneddon* v. *Lord Advocate* [1954] A.C. 257, as a result of which the assistant controller of the Estate Duty Office agreed that the policies could be regarded as property in which the deceased never had an interest under the proviso to s. 4 of the Finance Act, 1894, and that duty was consequently determinable in accordance with s. 33 (2) (*a*) of the Finance Act, 1954.

AGGREGAPHOBIA

London, W.C.2.

National Service Deferment

Sir,—I was recently instructed to appear before a military service (hardship) committee in this area, in order to obtain deferment from military service of a farm labourer, an employee of a client. The tribunal consisted of three gentlemen, one of whom it appeared was nominated by a trade union, one apparently by an employers' association, possibly the National Farmers Union, and a third the chairman. The matter proceeded, and the chairman then asked each of his colleagues in turn whether they had any questions to ask. The trade union representative then asked the following question: "Is the applicant a member of the Agricultural Workers Union? If so, has he reported this matter to the union, and if so what recommendation or action has the union taken?" It seems to me that such a question is completely irrelevant to the proceedings in issue. I would have thought that the object of the tribunal was to decide whether it was in the national interests that the applicant should remain at his work on the farm in question, or should do his military service in the armed forces of the Crown, and that it was no part of the duty of the tribunal to inquire or in any way make propaganda for a trade union. I feel that this experience should be brought to the notice of other members of the profession who may appear before these tribunals, as it seems to me that such remarks are neither justice nor good administration. I might say that in spite of the applicant answering that he was not a member of the union and did not believe in them, his application was nevertheless successful.

J. V. C. CLAREMONT.

Eastbourne,
Sussex.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

RATING: EXEMPTION: HOSPITAL: VACANT ADJOINING LAND: "USED" FOR PURPOSES OF HOSPITAL

Newcastle City Council *v.* Royal Newcastle Hospital

Viscount Simonds, Lord Cohen, Lord Somervell of Harrow, Lord Denning. 19th March, 1959

Appeal from the High Court of Australia.

The respondent, Royal Newcastle Hospital, a public hospital for the treatment of tuberculosis, owned 291 acres of unfenced land in its virgin state adjoining other land in the City of Newcastle owned by the hospital and on which it stood. The 291 acres, of which the hospital made no physical use—it was vacant land intersected by steep gullies and heavily timbered—had been acquired for the purposes of the hospital, namely, to keep the atmosphere clear and unpolluted; to prevent building on the land; to provide quiet and serene surroundings for the patients; and to give room to expand the activities of the hospital. The appellant, the Newcastle City Council (New South Wales), claimed to recover rates on the 291 acres, and the question was whether the hospital was exempt from rates in respect of that land under s. 132 of the Local Government Act, 1919 (N.S.W.), which provided: "(1) All land in a municipality . . . shall be rateable except . . . (*d*) land which belongs to any public hospital . . . and is used or occupied by the hospital . . . for the purposes thereof; . . ." The trial judge (Richardson, J.), whose judgment was affirmed by a majority decision of the Supreme Court of New South Wales which, in turn, was upheld by a majority judgment of the High Court of Australia on 21st March, 1957, held that the respondent was not liable to pay rates in respect of the 291 acres. The City Council appealed.

LORD DENNING, giving the judgment, said that an owner could use land by keeping it in its virgin state for his own special purposes, and the 291 acres, from which the hospital intentionally derived the above specified advantages, were "used" for the purposes of the hospital and were therefore exempt from the payment of rates under s. 132 (1) (*d*) of the 1919 Act. Their lordships had some doubt whether the 291 acres were "occupied" by the hospital, because they were not fenced in or enclosed in any way, and it was difficult to say that they were so much linked with the hospital grounds as to form part of an entire whole. But it was unnecessary to come to a conclusion on the point. Appeal dismissed. The appellant must pay the costs.

APPEARANCES: *B. MacKenna*, Q.C., and *Peter Oliver* (*Kimbers*); *Gordon Wallace*, Q.C. (Australia), and *J. G. Le Quesne* (*Light and Fulton*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 476**

BUILDING LEASE: CONSTRUCTION: NEW PLANS: APPROVAL OF LESSOR UNREASONABLY WITHHELD

Commissioner for Railways *v.* Avrom Investments Proprietary, Ltd.

Viscount Simonds, Lord Morton of Henryton, Lord Cohen, Lord Somervell of Harrow, Lord Denning. 19th March, 1959

Appeal from the Supreme Court of New South Wales.

By cl. 4 of a building lease relating to an important undeveloped site in Sydney it was provided, *inter alia*, that the lessee would spend not less than £150,000 in erecting an hotel on the demised premises, "and the new building . . . shall at all times be in accordance with such building design plan and specification as the . . . lessor may in his absolute discretion approve . . . and notwithstanding anything hereinbefore contained the building design plan and specification of the said building shall be subject to the reasonable requirements of the lessor . . ." In 1954 plans for an hotel were submitted by the lessee corporation, the respondents Avrom Investments Pty., Ltd., to the lessor, the Commissioner for Railways, the appellant, who approved them subject to modifications and conditions, but, the lowest tender being more than the lessee was prepared to spend, it intimated that for financial reasons it did not propose to build in accordance with the 1954 plans. Thereafter, in 1956, it submitted new plans, which were never approved by the lessor, for a building costing less, and shortly after it entered into a contract with a building contractor to construct a building in accordance with those new plans. The lessor thereupon brought this suit claiming, *inter alia*, a declaration that the lessee was not entitled to erect a building on the demised premises other than in accordance with plans and specifications approved by the lessor, and an injunction to restrain it from so doing, and a declaration that the lessee was bound under the lease to erect the building approved by the lessor in 1954. McLelland, J., sitting as the Supreme Court of New South Wales in Equity, dismissed the suit, and gave leave to bring the present appeal.

LORD SOMERVELL OF HARROW, giving the judgment, said that in the circumstances there was no approval of the 1954 plans sufficient to justify the submission that the lessee became liable under the contract to erect a building in accordance with those plans and had no right to submit further plans for consideration. Nor was there anything in the contract which justified that submission, nor anything in the circumstances which would have entitled the lessor to refuse to consider the further plans. As the provision in cl. 4 that the plans "shall be subject to the reasonable requirements of the lessor" had to be given effect "notwithstanding anything hereinbefore contained," the lessor, notwithstanding the words "absolute discretion" used earlier in cl. 4, if he disapproved, must have reasonable grounds for so doing, and in the present case there was ample evidence that approval of the 1956 plans was unreasonably withheld by the lessor—those plans had a number of advantages over those of 1954. Consent having been unreasonably withheld by the lessor to the alteration, it could in the circumstances have been made by the lessee without any further application to the lessor, and this was so though there were also certain public authorities whose approval of the plans was necessary (*Balls Bros., Ltd.* v. *Sinclair* [1931] 2 Ch. 325). Appeal dismissed.

APPEARANCES: *R. O. Wilberforce*, Q.C., *M. Jenkyn*, Q.C. (Australia), and *Hermann Jenkins* (Australia), (*Light & Fulton*); *Gordon Wallace*, Q.C. (Australia), and *R. W. Fox* (Australia), (*Ashurst, Morris, Crisp & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[1 W.L.R. 389**

Queen's Bench Division

NEGLIGENCE: BREACH OF STATUTORY DUTY: UNSAFE MEANS OF ACCESS TO SHIP'S HOLD: ACCIDENT: LIABILITIES OF EMPLOYERS AND SHIPOWNERS

Mace *v.* R. & H. Green and Silley Weir, Ltd., and British India Steam Navigation Co., Ltd.

Lord Parker, C.J. 27th February, 1959

Action.

The plaintiff, a boilerman employed by the first defendants, ship repairers, was instructed by his chargehand to open the manhole doors in the floor of one of the holds of a ship in wet dock owned and occupied by the second defendants. The ship was still being unloaded, but the hold in which the plaintiff was required to work had been cleared of a bagged cargo of caster seed the previous day, except for spillage and dunnage which the crew were clearing and stacking at the time the plaintiff went down to do his work. Having completed his work, the plaintiff, while ascending a ladder giving access from the hold to the 'tween deck, caught his foot in a rope wound round one of the rungs, slipped and fell, sustaining injury. He sued his employers, alleging negligence, and the shipowners, alleging, *inter alia*, a

breach of reg. 11 (1) of the Docks Regulations, 1934, in failing to provide a safe means of access to the place in which the work was being carried on.

LORD PARKER, C.J., found that there was a rope wound round a rung of the ladder which caused the plaintiff to slip; that the rope constituted a danger and prevented the ladder from being a safe means of access to the hold. His lordship said that this was not a case where the work demanded an inspection and a laying out of the work by the employers for the safety of their workmen. Ship repairers doing work on a ship in the course of a turn round were entitled to assume, in the absence of notice, that the premises where their men were to work were safe. Accordingly, there was no breach of the employers' duty towards the plaintiff and his case against them failed. As to the case against the shipowners, reg. 11 (1) of the Docks Regulations, 1934, which came in Pt. II of the regulations, was made in respect of certain processes including those of "loading, unloading . . . any ship in any dock . . ." It was perfectly general and so did not apply merely to persons employed in the processes. The plaintiff qualified for protection under it if it applied at all in the circumstances of this case where the actual unloading of the bagged cargo in the hold had been completed and the hatch covers on the main deck had been put on. He accepted the contention of the shipowners that the words "in which work is being carried on" in reg. 11 (1) meant "in which work on the processes is being carried on." But the matter did not end there. Counsel had contended for the plaintiff that the processes of unloading and of handling goods had not been completed until the spillage had been cleared up and the dunnage stacked. There was no authority on the point, but two cases, *Manchester Ship Canal Co.* v. *Director of Public Prosecutions* [1930] 1 K.B. 547 and *Hawkins* v. *Thames Stevedoring Co., Ltd., and Union Cold Storage Co., Ltd.* [1936] 2 All E.R. 472 were authority for the proposition that the process of unloading was to be looked upon as a wide description of a process involving matters which had to be judged in connection therewith and ancillary thereto, such as closing hatch covers. It seemed to him that the sweeping up of the spillage was really to be looked at as ancillary to and part of the process of unloading or of loading. He need not deal with dunnage. Accordingly, at the time when this accident occurred, the Docks Regulations applied and, on his findings, there was not then a safe means of access from the hold to the 'tween deck. The plaintiff was entitled to succeed against the shipowners but as he had been guilty of contributory negligence he would be awarded two-thirds of the damages which, including special damage, would be assessed at £9,330.

APPEARANCES: *Charles Doughty*, Q.C., and *J. G. K. Sheldon* (*Shaen, Roscoe & Co.*); *R. Marven Everett*, Q.C., and *H. Tudor Evans* (*Barlow, Lyde & Gilbert*); *Montague Berryman*, Q.C., and *W. G. Wingate* (*Botterell & Roche*).

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law] **[2 W.L.R. 504**

TOWN AND COUNTRY PLANNING: CAR BREAKERS' YARD: INJURY TO AMENITY: NOTICE OF ABATEMENT

Stephens *v.* Cuckfield Rural District Council

Lord Parker, C.J. 3rd March, 1959

Action.

The plaintiff was the owner of a piece of land on part of which, in about 1939, he erected structures for the purpose of a sawmill; the land surrounding the structures was used as a sawmill yard. In 1955 the use as a sawmill was abandoned and the land was let to car breakers, who used the surrounding yard of the premises as well as the old sawmill for car breaking. In 1957 the defendants, the local authority, served a notice on the plaintiff purporting to be pursuant to s. 33 of the Town and Country Planning Act, 1947, stating that the condition of the open land within the curtilage of the premises was causing serious injury to the amenity of the district and ordering the removal from the land of all cars, car bodies and machinery. The plaintiff claimed a declaration that the land within the curtilage of his premises referred to in the notice was not "a garden, vacant site or other open land" within the meaning of s. 33, and that the notice was of no effect in law.

LORD PARKER, C.J., said that the words of s. 33 seemed to be very wide and the phrases "any garden, vacant site or other open land" taken together seemed to describe in the widest possible terms any land on which there was no building. His lordship was inclined, on the whole, to accept the plaintiff's contention and to say that s. 33, properly construed, had to be limited to a case where, at any rate, the garden, vacant site, or other open land was not within the curtilage of a building, and had not, as it were, acquired the user of that building. It seemed to his lordship that in order to really make sense of the scheme of legislation, and to avoid absurdity, one had to limit the words "garden, vacant site or other open land" to a garden, vacant site or other open land which was, at any rate, not within the curtilage of a building. His lordship appreciated that that might give rise to questions in some cases as to what was, and what was not, within the curtilage of a building, and indeed, it might be that curtilage was not the right test, but that the test was whether, as in the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, the land was occupied with a use for the same purposes as the building; but as far as the present case was concerned, there was no difficulty, because the notice itself was specifically dealing with the condition of open land within the curtilage of those premises. Accordingly, the notice was a nullity.

APPEARANCES: *G. G. Baker*, Q.C., and *Ronald M. Bell* (*Iliffe, Sweet & Co.*); *D. P. Kerrigan* (*Sharpe, Pritchard & Co.*, for *J. A. Churchill*, Cuckfield).

[Reported by Miss C. J. ELLIS, Barrister-at-Law] **[2 W.L.R. 480**

CASES REPORTED IN VOL. 103

20th March to 10th April, 1959

For cases reported up to and including 13th March, see p. *222 ante*

ADMITTANCE OF PUBLIC TO PATENTS HEARINGS

On 26th March the Board of Trade laid before Parliament rules made under the Patents Acts, 1949–1957, providing for the admittance of the public to the hearing of certain patent matters by the Comptroller-General of Patents, Designs and Trade Marks. Normally in the past such hearings have been in private. In order to give the parties notice of the change in practice, the new rules will not come into operation until 1st July.

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